

No. 97-1235-CFX

Title: City of Monterey, Petitioner  
v.

Del Monte Dunes at Monterey, Ltd., and Monterey-Del  
Monte Dunes Corporation

Docketed:

January 28, 1998

Court: United States Court of Appeals for  
the Ninth Circuit

Entry Date

Proceedings and Orders

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Jan 26 1998	Petition for writ of certiorari filed. (Response due February 27, 1998)
Feb 24 1998	Brief amici curiae of City and County of San Francisco filed.
Feb 27 1998	Brief of respondents Del Monte Dunes At Monterey, Ltd, et al. in opposition filed.
Mar 11 1998	DISTRIBUTED. March 27, 1998
Mar 30 1998	Petition GRANTED. SET FOR ARGUMENT October 7, 1998. *****
Apr 20 1998	Order extending time to file brief of petitioner on the merits until June 4, 1998.
Jun 4 1998	Order further extending time to file brief of petitioner on the merits until June 5, 1998.
Jun 4 1998	Brief amicus curiae of American Planning Association filed.
Jun 4 1998	Brief amici curiae of New Jersey, et al. filed.
Jun 4 1998	Brief amici curiae of League for Coastal Protection, et al. filed.
Jun 4 1998	Joint appendix filed.
Jun 4 1998	Brief of petitioner City of Monterey filed.
Jun 4 1998	Brief amici curiae of City and County of San Francisco, et al. filed.
Jun 4 1998	Brief amicus curiae of Municipal Art Society of New York, Inc. filed.
Jun 4 1998	Brief amici curiae of National League of Cities, et al. filed.
Jun 5 1998	Brief amicus curiae of United States filed.
Jun 15 1998	Order extending time to file brief of respondent on the merits until July 31, 1998.
Jul 23 1998	Brief amici curiae of Defenders of Property Rights, et al. filed.
Jul 28 1998	Brief amici curiae of California Association of Realtors, et al. filed.
Jul 29 1998	Brief amici curiae of Pacific Legal Foundation, et al. filed.
Jul 31 1998	Brief amici curiae of American Farm Bureau Federation, et al. filed.
Jul 31 1998	Brief amici curiae of Washington Legal Foundation, et al. filed.
Jul 31 1998	Brief amicus curiae of Institute for Justice filed.
Jul 31 1998	Brief amici curiae of National Association of Home Builders, et al. filed.
Jul 31 1998	Brief of respondents Del-Monte Dunes at Monterey, Ltd, et al. filed.
Aug 7 1998	Record filed.

2 pp



Entry	Date	Proceedings and Orders
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Aug 11 1998	CIRCULATED.
Aug 14 1998	Record filed.
Aug 17 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 2 1998	Reply brief of petitioner City of Monterey filed.
Sep 9 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 7 1998	ARGUED.

971235 JAN 26 1998

No. \_\_\_\_\_

OFFICE OF THE CLERK

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In The  
**Supreme Court of the United States**  
October Term, 1997

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CITY OF MONTEREY,

*Petitioner,*

v.

DEL MONTE DUNES AT MONTEREY, LTD. AND  
MONTEREY-DEL MONTE DUNES CORPORATION,

*Respondents.*

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On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTIONS PRESENTED**

1. Whether, in a regulatory taking action challenging a local land use decision, 42 U.S.C. § 1983 requires that all liability issues be determined by the court rather than by a jury.
2. Whether liability for a regulatory taking can be based upon a standard that allows a jury or court to reweigh evidence concerning the reasonableness of the public agency's land use decision.
3. Whether the reasonable proportionality standard established by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) in the context of property exactions can properly be applied to an inverse condemnation claim based upon a regulatory denial.



## PARTIES BELOW

The parties below consisted of plaintiffs Del Monte Dunes at Monterey, Ltd. and Monterey-Del Monte Dunes Corporation and defendant City of Monterey.

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## **PETITION FOR A WRIT OF CERTIORARI**

The City of Monterey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

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## **OPINIONS BELOW**

The opinion of the court of appeals is reported at 95 F.3d 1422 (9th Cir. 1996). Pet. App. A1-A29. The relevant, prior orders of the district court are unreported but are included herein at Pet. App. A30-A43.

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## **JURISDICTION**

The court of appeals filed its initial opinion on September 13, 1996 (95 F.3d 1422). The court of appeals initially granted rehearing on June 26, 1997 (Pet. App. A44) and subsequently decided on October 28, 1997 not to amend its opinion. (Pet. App. A46) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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## **CONSTITUTIONAL, PROVISIONS, STATUTES AND REGULATIONS INVOLVED**

1. The Fourteenth Amendment to the United States Constitution, Section 1, which provides, in pertinent part:  
  
No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

2. The Fifth Amendment to the United States Constitution, which provides, in pertinent part:

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. The Seventh Amendment to the United States Constitution, which provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact trial by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

4. 42 U.S.C. § 1983, which provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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### STATEMENT

This case involves a 37-acre parcel of undeveloped property located in the coastal area of the City of Monterey in California. The topography of the property consists largely of beach area and sand dunes. Since the early

1970s, the property has been zoned for residential development.

By virtue of its location and topography, any development of this property would raise important environmental considerations. Among other things, the sand dunes and the vegetation on the property provide habitat for the endangered Smith's Blue Butterfly ("SBB"). For this reason, both the United States Department of Fish and Wildlife ("USFWS") and the California Department of Fish and Game ("DFG") expressed keen interest in the property and how any proposed development might impact the sensitive SBB habitat.

After significant planning efforts involving the City, the owner of the property and others over a substantial period, the City gave conditional approval in September 1994 to a proposed site plan for a 190-unit condominium development. Among other things, however, the City advised the property owner that final approval of this proposed project would be contingent upon the owner's ability to provide adequate mitigation of adverse environmental impacts of the proposed development, including impacts on the SBB habitat. In this regard, the City required that the owner prepare a proposed habitat restoration plan and seek approval of that plan from USFWS and DFG.

Shortly after the City gave this conditional approval, Respondents purchased the subject property in December 1994 for approximately \$3.7 million. Thereafter, after eighteen months of additional consultations involving the City, Respondents, the California Coastal Commission, USFWS, DFG, other experts, and the public, Respondents



sought final approval of the proposed 190-unit development. As part of the public hearing process, Respondents presented a report from its consultant which concluded that the restoration plan generated as part of the proposed development had adequately mitigated any impact on the sensitive habitat located thereon. USFWS and DFG expressed contrary views as did members of the public and other experts. USFWS concluded that Respondents' proposed restoration plan had "little chance for long term success." The DFG advised the City that it had problems with the proposed restoration plan and that the proposed plan had not been approved by DFG. In June 1996, the City Council denied the proposed development because, among other things, it concluded that the proposed development and restoration plan did not adequately address the City's concerns over habitat protection.

Immediately thereafter, Respondents filed suit alleging that the City's denial of the proposed 190-unit project constituted a denial of their rights to substantive due process and equal protection and resulted in a taking of the subject property. The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331. An initial dismissal of the action on ripeness grounds was reversed by the Ninth Circuit, and the matter was remanded to the district court. *Del Monte Dunes at Monterey Ltd. v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990). In December 1991, Respondents sold the property to the State of California for \$4.5 million. However, Respondents continued to pursue their constitutional challenges, and the matter proceeded to trial in early 1994.

Prior to the commencement of trial, the City moved for an order that the liability issues raised by each of

Respondents' claims be decided by the court rather than a jury. The district court granted this motion insofar as it was directed at the substantive due process claim and concluded that it was its responsibility to decide whether the City's actions were arbitrary and capricious. Pet. App. A33. However, the district court ruled that all aspects of Respondents' equal protection and inverse condemnation claims would be decided by a jury. Pet. App. A33-A34.

The evidence at trial consisted largely of the same conflicting evidence that the City Council had considered in mid-1986 when it denied the proposed development. Respondents presented the same habitat expert that they had presented to the City Council, and he expressed the same opinion that the habitat restoration plan that had been proposed by Respondents was adequate. The City introduced contrary opinions from a different expert who had also previously expressed his opinions to the City Council. The City also introduced as evidence the same USFWS and DFG evaluations of likely environmental impacts and the inadequacy of the proposed restoration plan that had been considered by the City Council.

After hearing all of the evidence, the district court concluded that the City had not acted arbitrarily and capriciously so as to violate Respondents' right to substantive due process. The Court concluded that, in rejecting the proposed development, the City "was acting for valid regulatory reasons and not attempting to forestall all reasonable development." Pet. App. A43. In arriving at this conclusion, the district court noted that the proposed project raised environmental issues that both USFWS and DFG had concluded were not adequately mitigated. Pet. App. A42.



In contrast, with respect to the claims for denial of equal protection and for inverse condemnation, the jury concluded on the same evidence that the City's denial of the proposed 190-unit condominium development had resulted in an uncompensated taking of Respondents' property and had violated Respondents' equal protection rights. The jury awarded \$1.45 million in temporary takings damages.

On appeal, the City challenged the jury's decision as to both the equal protection and inverse condemnation claims. The Court of Appeals for the Ninth Circuit affirmed the judgment on the basis of the jury's inverse condemnation verdict and therefore did not deem it necessary to address the City's challenges to the equal protection verdict.

With respect to the inverse condemnation claim, the panel ruled that all issues relating to the inverse condemnation claim were properly submitted to the jury for decision. Pet. App. A7-A15. The court reasoned that such inverse condemnation claims were analogous to common law damage actions such as actions for trespass or replevin which had historically been triable by jury at common law. Pet. App. A9. The Ninth Circuit further concluded that the issues of inverse condemnation liability were essentially factual questions for the jury rather than mixed questions of fact and law of a type that were properly decided by the court. Pet. App. A15.

As to the standard that should be applied to determine whether the jury's inverse condemnation verdict could be upheld, the Ninth Circuit applied a reasonableness test. The court explained that the jury's decision was

sustainable so long as there was evidence in the trial record that would support a finding by the jury that the City had acted unreasonably in concluding that the proposed project failed to provide adequate protection for sensitive environmental habitat or otherwise failed to satisfy the conditions imposed by the City's conditional approval. Pet. App. A14, A16-A20.

In arriving at this reasonableness standard, the Ninth Circuit did not simply determine whether the jury could have properly found that the City's action in denying the proposed 190-unit project failed to substantially advance the legitimate public goal of protecting the environment. Instead, the court applied the standard of rough proportionality based upon this Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) which was decided several months after the trial in the present action. In framing the issue, the Ninth Circuit reasoned that "[e]ven if the City had a legitimate intent in denying Del Monte's development application, its action must be 'roughly proportional' to furthering that interest." Pet. App. A16. The Ninth Circuit concluded that "[s]ignificant evidence supports Del Monte's claim that the City's actions were disproportional to both the nature and extent of the impact of the proposed development." Pet. App. A20.



#### REASONS FOR GRANTING THE PETITION

In holding that a party has a right to have a jury determine liability in an inverse condemnation claim, the Ninth Circuit's decision conflicts directly with decisions of the Eleventh Circuit and departs sharply from the

accepted procedure for litigating such claims in both federal and state courts.

Further, the lower court's conclusion that a jury can invalidate a local land use decision and award almost \$1.5 million in damages because it concludes, based upon its *de novo* review of conflicting evidence, that the decision was unreasonable, constitutes an entirely new, intrusive standard of constitutional review that is inconsistent with long-standing federal precedent and federalism concerns.

Finally, the Ninth Circuit's application of the rough proportionality standard to measure the validity of the City's concerns that prompted denial of the proposed 190-unit development represents an unwarranted extension of this Court's "rough proportionality" standard, which was developed in the context of property exactions, and is inconsistent with a long string of precedent in which this Court has held that regulatory takings are to be evaluated based upon whether the challenged action substantially advances a legitimate public purpose.

**I. THE NINTH CIRCUIT'S DECISION HAS CREATED A CONFLICT AMONG THE CIRCUITS CONCERNING THE RIGHT TO JURY TRIAL AS TO INVERSE CONDEMNATION CLAIMS AND REPRESENTS A SHARP DEPARTURE FROM THE ACCEPTED MANNER OF LITIGATING SUCH CLAIMS.**

For as long as regulatory takings claims have been litigated in federal courts, the issue of inverse condemnation liability has almost uniformly been decided by courts

rather than by juries. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Mid Gulf, Inc. v. Bishop*, 792 F. Supp. 1205, 1215 (D. Kan. 1992); *Warner/Elektra/Atlantic Corp. v. County of Dupage*, 771 F. Supp. 911, 913 (N.D. Ill. 1991), *aff'd on other grounds*, 991 F.2d 1280 (7th Cir. 1993). In case after case, this Court has decided claims of inverse condemnation liability as matters of law or mixed law and fact. See, e.g., *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Indeed, it was so accepted that such issues were appropriate for court resolution that, until recently, the federal courts have rarely been called upon to expressly address this issue.

The Ninth Circuit's decision that a jury should decide inverse condemnation liability issues is a sharp departure from this accepted and usual approach and represents a clear conflict with the views of the Eleventh Circuit – the only other circuit that has squarely addressed this issue. In *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2514 (1997), the Eleventh Circuit held that there is no right to jury trial to determine liability in inverse condemnation claims brought in the context of a federal civil rights action. The plaintiff in that case asserted a regulatory taking claim and requested that the jury be allowed to determine whether such a taking had occurred. In rejecting this argument, the Eleventh Circuit explained that it had "discovered no indication that the rule in regulatory takings cases differs from the general eminent domain framework in which issues pertaining to whether a taking has occurred are for the court, while damage issues are the



province of the jury." 95 F.3d at 1092. On this basis, the Eleventh Circuit concluded that "no jury had to be empanelled for the regulatory takings claim." *Id.*

In reaching its decision that inverse condemnation liability issues were for the court to decide, the Eleventh Circuit was following consistent precedent developed in the context of both direct and inverse condemnation cases. This Court has recognized that, in direct condemnation actions, only the issue of just compensation is for the jury; all other issues are for the court.<sup>1</sup> *United States v. Reynolds*, 397 U.S. 14, 18 (1970) ("For it has long been settled that there is no constitutional right to a jury trial in eminent domain proceedings."). State courts have adopted this same principle under state constitutions: there is generally no right to trial by jury in condemnation actions except insofar as that right is specifically enforced by statute or rule. E.L. Kellett, Annotation, *How To Obtain Jury Trial In Eminent Domain: Waiver*, 12 A.L.R. 3d 7, 11 (1987) ("Generally, trial by jury in eminent domain proceedings is not guaranteed by the federal or state constitutions.")

The Ninth Circuit's decision and its conflict with the Eleventh Circuit's decision in *New Port Largo, Inc.*, pose a great risk of seriously complicating the adjudication of

<sup>1</sup> This Court has also recognized that inverse condemnation actions arise out of the same constitutional requirement that just compensation be paid for property being taken for public use and that inverse condemnation actions are essentially eminent domain proceedings initiated by the property owners. See *Agin v. City of Tiburon*, 447 U.S. 255, 258 n. 2 (1980).

inverse condemnation matters in both state and federal courts. Other circuits called upon to address this issue will be faced with two squarely inconsistent decisions. Although the Ninth Circuit had the opportunity to try to reconcile its decision with the decision in *New Port Largo, Inc.*, it made no effort to do so because no such reconciliation is possible.

The confusion likely to be spawned by the Ninth Circuit's decision will extend into the state courts as well. State courts have regularly ruled that there is no right to have a jury decide liability issues in a regulatory takings case. See, e.g., *Hensler v. City of Glendale*, 8 Cal. 4th 1, 15 876 P.2d 1043, 1052 (1994); *Brock v. State Highway Commission*, 195 Kan. 361, 366, 404 P.2d 934, 940 (1965). By concluding that a plaintiff has a right to have a jury decide all issues in a federal regulatory takings claim brought under 42 U.S.C. § 1983, the Ninth Circuit's decision raises the risk of confusion and inconsistency between state and federal treatment of such claims. The potential for such confusion is especially significant in light of this Court's repeatedly expressed preference that regulatory takings claims should first be submitted to state tribunals for adjudication as a condition precedent to federal court review. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-197 (1987). It would be highly anomalous, to say the least, to require adjudication of regulatory takings claims in state courts where state law and procedure precludes jury resolution of such claims but then require a jury trial in any related federal court proceeding arising from the same dispute.



One need look no further than this Court's prior decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) for an illustration as to how the Ninth Circuit's decision will confuse and complicate the litigation of takings claims. *Dolan* cited to a number of state court decisions that had previously addressed the issue of the nexus required to support dedication requirements or other exactions. 512 U.S. at 390-391. Invariably, these state courts had treated this issue as one for the courts, not for a jury. See, e.g., *City of College Station v. Turtle Rock Corp*, 680 S.W. 2d 802, 804 (Tex. 1982) ("The question of whether a police power regulation is proper or whether it constitutes a compensable taking is a question of law and not a fact.") Yet, the Ninth Circuit decision would indicate that challenges to exactions under Section 1983 must be submitted to a jury.

The Ninth Circuit's decision to allow a jury to determine inverse condemnation liability as a factual matter is also inconsistent with prior decisions of this Court and the other circuits which have treated such issues as mixed questions of fact and law to be decided by courts. This Court has previously determined the legal question of whether a taking had occurred by giving essentially *de novo* review of the lower court's liability determinations. For example, in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), this Court (as well as the two state appellate courts that previously considered the takings issue in that case) gave no deference to the trial court's findings of liability and ruled that, as a matter of law, the regulation in question permitted a reasonable beneficial use of the property. 438 U.S. at 137-138. See also *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595-597 (1962). Similarly, various circuits have held that courts,

and not juries, should resolve mixed questions of law and fact that implicate constitutional concerns in the land use context. See *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 682 (3rd Cir. 1991), *cert. denied*, 503 U.S. 984 (1992); *Greenbriar v. City of Alabaster*, 881 F.2d 1570, 1578 (11th Cir. 1989).

This Court has recognized the importance of maintaining judicial control over important constitutional standards. *Ornelas v. United States*, \_\_\_ U.S. \_\_\_, 116 S. Ct. 1657, 1662 (1996). This requires that even ad hoc inquiries that involve mixed questions of fact and law should be treated as legal questions to be decided by the courts where doing so will increase consistency and clarity of constitutional principles. *Id.* at 1662-1663. Allowing juries to decide the meaning of standards such as whether a land use decision "substantial advances" a public purpose or deprives a property of all "economically viable use" would be contrary to these goals.

## II. THE NINTH CIRCUIT'S DECISION THAT THE JURY COULD DETERMINE INVERSE CONDEMNATION LIABILITY BY APPLYING A REASONABLENESS STANDARD TO CONFLICTING EVIDENCE FUNDAMENTALLY ALTERS THE ROLE OF THE CONSTITUTION IN THE REVIEW OF LOCAL LAND USE POLICIES AND DECISIONS.

The Ninth Circuit's decision in this case fundamentally changes and expands the role of the Fourteenth Amendment and Section 1983 in the review of local land use policies and decisions. It does so by changing the standard of constitutional review in regulatory takings

cases from one of "rational relationship" between the challenged action and public purpose, which reflects deference to local decisionmakers, to one of "reasonableness" with the jury free to find liability if it disagrees with the conclusion reached by the local legislative body based upon essentially the same evidence.<sup>2</sup>

For many years, this Court has held that, in a regulatory takings context, inverse condemnation liability exists if the challenged action fails to substantially advance a legitimate public purpose. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1960). In regulatory situations, the local agency meets this standard so long as there exists a reasonable relationship between the challenged action and a legitimate public concern. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

By its nature, this standard of liability is highly deferential to local public entities. It had its origins in principles of substantive due process and the arbitrary and capriciousness standard. So long as there was some basis

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<sup>2</sup> The jury was asked to determine inverse condemnation liability under two theories: a) whether the City's decision substantially advanced a legitimate public purpose; and b) whether the City's decision deprived the property of all economically viable uses. Because the jury's verdict did not indicate which of these theories formed the basis of its liability finding, the Ninth Circuit recognized that the jury's inverse condemnation verdict could be upheld on appeal only if it were legally supportable under both theories. Accordingly, the Ninth Circuit's formulation of an erroneous reasonableness standard to uphold the jury's liability finding on one of these two theories of liability was critical to its affirmance of the judgment.

for the local agency's conclusion or it was "at least debatable" that the challenged action related to a legitimate goal, it would not be constitutionally infirm. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1973); *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927). This deferential standard was essential to ensure that federal courts and federal law did not displace the authority and discretion properly belonging to local decisionmakers. See *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1389 (11th Cir. 1993), cert. denied, 114 S. Ct. 1400 (1994); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988).

The Ninth Circuit's decision fundamentally changes this deferential standard. The court permitted the jury to declare the City's action to be constitutionally defective so long as it concluded, based upon conflicting evidence, that the City's determination that various concerns had not been satisfied was unreasonable. This unprecedented standard of constitutional review exposes local public bodies to federal inverse condemnation liability any time a jury chooses to reject evidence supporting the local decision and to accept other evidence that the local agency found unpersuasive.

In effect, the panel's decision would allow any jury to become a "zoning board of appeal under federal law" with the power to impose constitutional liability if it chooses to reject the evidence relied upon by the local public entity and conclude that the entity's action was unreasonable. In the present case, for example, the record demonstrates that City Council was presented with substantial evidence from state and federal regulatory bodies and others that the proposed development would harm



sensitive habitat. Respondents presented contrary evidence. Under the traditional reasonable relationship test, the City's action could not be found unconstitutional merely because the court or jury chose to accept the property owner's evidence that it had adequately mitigated the environmental impacts. However, by establishing a new standard of liability that permits a jury to reweigh the evidence and apply *de novo* review of the City's decision, the panel has fundamentally and erroneously changed the scope of constitutional review of local land use decisions.

The Ninth Circuit's adoption of a reasonableness test as the constitutional standard of review has implications for virtually all land use decisions made by public agencies. Almost invariably, significant development proposals will raise a number of legitimate public concerns and the information considered by the local decisionmaking body will be in conflict as to the magnitude of these concerns and the extent to which they have been mitigated. The Ninth Circuit's standard allows any party to mount a successful constitutional challenge to any denial of a project merely by showing that the local decisionmaker acted unreasonably in rejecting the evidence favoring development. Essentially, the Ninth Circuit has replaced the deferential standard of review which requires only a rational relationship between a legitimate concern and the challenged decision with a standard that allows *de novo* review by a jury of the evidence considered and rejected by the local decisionmaker.

The extraordinary result of the panel's application of this new standard is made stark by comparing the panel's review of the jury's decision with the district court's

decision on the analogous substantive due process claim, which was not challenged by Respondents. Based upon the same evidence considered by the jury, the district court decided, as a matter of law, that the City had not acted arbitrarily and "was not attempting to forestall all reasonable development." The district court concluded that the City was acting in good faith and that there was substantial evidence supporting the City's concern that habitat protection concerns had not been met. Pet. App. A36-A43. Yet, the panel allowed the jury finding of inverse condemnation liability to stand merely because Respondents had presented evidence (apparently accepted by the jury) that the City's decision was unreasonable and would not permit development.

### III. THE NINTH CIRCUIT'S DECISION CONSTITUTES AN ERRONEOUS AND UNWARRANTED EXPANSION OF THE ROUGH PROPORTIONALITY TEST ADOPTED BY THIS COURT IN *DOLAN V. CITY OF TIGARD*.

While the jury was asked in jury instructions to determine whether the City's action bore a reasonable relationship to any legitimate public purpose, the panel's decision upholding inverse condemnation liability does not apply this standard. Rather, the panel imposes a new and different standard based upon *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which was decided by the Supreme Court months after the jury reached its verdict in the present case. The panel concluded that the City's action must not only further a legitimate public purpose but that the action must also be "roughly proportional" to that



purpose. Pet. App. A16. ("Even if the City had a legitimate interest in denying Del Monte's development, its actions must be 'roughly proportional' to furthering that interest.")

As a matter of law, the panel's extension of the *Dolan* holding into the regulatory takings context of the present case was inappropriate. *Dolan* arose in the context of a land use decision that had required that a landowner dedicate property to a public entity and provided a standard for determining whether such a dedication would be excessive. Central to the *Dolan* analysis is the distinction between land use regulation and governmental actions that require that an interest in the property be given to the public agency. As explained by the Chief Justice in explaining the rationale of *Dolan* and the Court's prior decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987):

The sort of land use regulations discussed in the [regulatory takings] cases just cited . . . differ from the present case. . . . [T]he conditions imposed were not simply a limitation on the use petitioner might make of her own parcel but a requirement that she deed portions of her property to the city.

512 U.S. at 385.

*Dolan* did not purport to establish a new standard of liability in all regulatory takings cases. In articulating its rough proportionality standard, *Dolan* expressly stated that the city in that case "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." 512 U.S. at 391. Thus, by its own

terms, this standard was applied only to a challenged exaction, and nothing in *Dolan* suggests that its holding changed the settled standard of inverse condemnation liability in regulatory taking cases that a challenged action need only bear a reasonable relationship to a legitimate public purpose. See, e.g., *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) ("Based on a close reading of *Nollan* and *Dolan*, we conclude that these cases (and the tests outlined therein) are limited to the context of development exactions where there is a physical taking or its equivalent.").

The Ninth Circuit's decision takes the *Dolan* "rough proportionality" standard and applies it in an entirely different context. The Ninth Circuit extended *Dolan* to measure the constitutionality of the City's regulatory decision to deny Respondents' proposed development. The basis for that denial was not Respondents' unwillingness to convey property interests demanded by the City. Rather, the denial was based upon the City's determination that the proposed development posed unacceptable environmental impacts that would not be mitigated by Respondents.

Applying the rough proportionality standard in regulatory contexts such as this would constitute a major departure in the constitutional review of such decisions. Any dissatisfied property owner could challenge rationally-based land use regulations or decisions that had appropriate goals by claiming that the concerns underlying the decision were not roughly proportional to the impacts of the proposed development. Thus, for example, a local legislative decision to deny a project based upon concerns that the proposed project did not adequately

address risks of earth movement could be constitutionally challenged on the ground that these concerns were not roughly proportional to the impacts of the project. Similarly, a regulatory decision that a proposed development had not mitigated traffic problems could be rendered constitutionally infirm unless the deciding body established that its concerns were roughly proportional to the traffic impacts of the project.

In and of itself, extending the rough proportionality standard into the context of regulatory decides is an erroneous and unwarranted expansion of constitutional review over land use decisionmaking. When combined with the Ninth Circuit's application of a reasonableness standard that allowed a jury to give *de novo* review of the City's decision, the Ninth Circuit's decision improperly federalizes land use planning and exposes local decision-makers across the country to great uncertainty and unwarranted liability.

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## CONCLUSION

The petition for a writ of certiorari should be granted to resolve a conflict among the circuits and to provide clear guidance to both federal and state courts as to the appropriate federal standards of review and liability in regulatory takings cases.

Respectfully submitted,

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January 1998

App. 1

**APPENDIX A**  
**FOR PUBLICATION**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DEL MONTE DUNES AT MONTEREY,  
LTD., et al.,

*Plaintiff-Appellee,*

v.

CITY OF MONTEREY,

*Defendant-Appellant.*

No. 94-16248

D.C. No.  
CV-86-05042-CAL

DEL MONTE DUNES AT MONTEREY,  
LTD., and MONTEREY-DEL MONTE  
DUNES CORPORATION,

*Plaintiffs-Appellants,*

v.

CITY OF MONTEREY,

*Defendant-Appellee.*

No. 94-16313

## OPINION

Appeal from the United States District Court  
for the Northern District of California  
Charles A. Legge, District Judge, Presiding

Argued and Submitted  
November 16, 1995 – San Francisco, California

Filed September 13, 1996



Before: J. Clifford Wallace and Edward Leavy,  
Circuit Judges, and Lourdes G. Baird,\* District Judge

Opinion by Judge Wallace

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### COUNSEL

George A. Yuhas, Orrick, Herrington & Sutcliffe, San Francisco, California, for the defendant-appellant-cross-appellee.

Frederik A. Jacobsen, San Mateo, California, for the plaintiffs-appellees-cross-appellants.

J. Matthew Rodriguez, Deputy Attorney General, Sacramento, California, for the amicus.

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### OPINION

WALLACE, Circuit Judge:

The City of Monterey (City) appeals from a district court judgment following a jury verdict in favor of Del Monte Dunes at Monterey, Ltd. and Monterey-Del Monte Dunes Corporation (collectively Del Monte), and a district court order denying the City's motions for judgment as a matter of law and for a new trial. Del Monte cross-appeals from the district court's decision limiting available damages. The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291, and we affirm.

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\* Honorable Lourdes G. Baird, United States District Judge, Central District of California, sitting by designation.

### I

Del Monte brought this civil rights action against the City alleging, among other things, violations of due process and equal protection as a result of the City's taking of Del Monte's property. The property at issue consists of approximately 37.6 ocean-front acres located in the City, commonly referred to as Del Monte Dunes (Dunes).

In 1981, Ponderosa Homes, which subsequently sold the Dunes to Del Monte, applied to the City for a permit to develop the Dunes into a 344-unit residential complex. The City rejected the application. Ponderosa Homes then submitted three more applications for 264, 224, and 190-unit residential developments, all of which could have conformed with the City's general land-use plan and zoning ordinances. *See Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1499 (9th Cir. 1990) (*Del Monte Dunes I*). While the last application was pending, Del Monte purchased the Dunes and continued pursuing the application, which the City eventually denied in 1986. The lengthy application process and numerous conditions for approval the City imposed on Del Monte are detailed in our earlier decision reversing in part the district court's dismissal of Del Monte's claims. *See id.* at 1499-1506, 1509.

Prior to trial, the district court ordered all reinstated issues tried to a jury, save for those related to Del Monte's substantive due process claim, which the court determined presented only legal issues. Following a trial, the jury found that the City's actions denied Del Monte equal protection and resulted in an unconstitutional taking; it awarded Del Monte \$1,450,000. The district court held

that the City did not violate Del Monte's substantive due process rights because the City asserted valid regulatory reasons for denying Del Monte's development application. The latter decision is not disputed. The district court then entered judgment in favor of Del Monte.

The City moved the district court for a judgment as a matter of law and for a new trial as to both the equal protection and inverse condemnation claims. The district court denied these motions, and this appeal followed.

The City argues that the court rather than the jury should have decided Del Monte's equal protection and taking claims. As to the equal protection claim, the City contends that its liability presents a mixed issue of law and fact and as such should have been decided by the court. As to the inverse condemnation claim, the City contends that there is no right to a jury trial for such claims. The City therefore asserts that it is entitled to a new trial. Alternatively, the City argues that it is entitled to a judgment as a matter of law on both the equal protection and inverse condemnation claims. Finally, the City contends that the district court should have ordered a new trial on damages because certain evidence relating to damages was erroneously admitted, resulting in an excessively large award.

On cross-appeal, Del Monte argues that the district court improperly denied it damages for loss of return and loss of value. At oral argument, Del Monte stated it would waive this argument in the event we affirmed the district court's judgment.

## II

At the outset, we consider whether reversal of either the inverse condemnation claim or the equal protection claim would require a new trial. The district court instructed the jury on two separate claims. First, the district court addressed Del Monte's takings claim, instructing the jury that it should find for Del Monte if (1) all economically viable use of the property had been denied; or (2) the City's decision to reject Del Monte's development application did not substantially advance a legitimate public purpose. The court stated: "[I]f you find that either of these things has been proved, your verdict indeed is for the plaintiff on this taking claim."

Second, the district court instructed the jury on the equal protection claim, requiring it to bring back a judgment for Del Monte if (1) property similarly situated; (2) received different treatment from the City; and (3) no rational basis accounted for the differential treatment. "If you find that each of these elements has been proved by a preponderance of the evidence, your verdict should be for the plaintiff on the equal protection claim." Thus, the jury was charged separately on the taking and equal protection claims.

This case does not present the interplay of a general verdict and alternative theories of liability. *See Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1373 (9th Cir. 1987) (*Landes*). Rather, we are presented with a damages award that resulted from the City's liability for both the takings and the equal protection claims. *See id.* (distinguishing *Syufy Enter. v. American Multicinema*, 793 F.2d 990, 1001-02 (9th Cir. 1986) (*Syufy Enterprises*) (general



verdict usually upheld only if substantial evidence supports each and every theory of liability submitted to the jury), *cert. denied*, 479 U.S. 1031 (1987)). The district court instructed the jury that if it found the City liable for any constitutional violation, it should award Del Monte damages "in an amount that will compensate [Del Monte] for the delay [proximately] caused by the City's action." We therefore can affirm the judgment and verdict if we determine that substantial evidence supports either the inverse condemnation or equal protection claims. See *Landes*, 833 F.2d at 1373. If we hold that the inverse condemnation claim and resultant damages can be affirmed, we need not consider the City's arguments concerning the equal protection claim.

### III

We next review the district court's denial of the City's motion for a new trial. We review a district court's denial of a motion for new trial for an abuse of discretion. *California Sansome Co. v. U.S. Gypsum*, 55 F.3d 1402, 1405 (9th Cir. 1995) (*California Sansome*). Entitlement to a jury trial and a trial court's submission of an issue to the jury, however, are legal questions which we usually review de novo. See *KLK, Inc. v. United States Dep't of Interior*, 35 F.3d 454, 455 (9th Cir. 1994) (*KLK*) (reviewing de novo submission of just compensation issue to the jury). "Little turns [ ] on whether we label review of this particular question abuse of discretion or *de novo*, for an abuse of discretion standard does not mean a mistake of law is beyond appellate correction. A district court by definition abuses its discretion when it makes an error of law." *Koon v.*

*United States*, Nos. 94-1664, 94-8842, 1996 WL 315800, at \*13 (U.S. June 13, 1996) (citation omitted).

### A.

The City first argues that because Del Monte had no right to a jury trial on its inverse condemnation claim pursuant to either 42 U.S.C. § 1983 or the Seventh Amendment, the court rather than the jury should have determined whether the City's actions effected an unconstitutional taking. We are required to determine first whether Del Monte was entitled to a jury trial pursuant to section 1983 before we consider whether the Seventh Amendment guarantees a jury trial under the present circumstances. See *Lorillard v. Pons*, 434 U.S. 575, 577 (1978) (*Lorillard*) (courts should avoid the Seventh Amendment question if a statute provides a right to jury trial).

Section 1983 allows persons deprived of rights secured by laws of the United States to bring "an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. The statute is silent with respect to whether plaintiffs have a right to a jury trial in actions brought pursuant to it. We must therefore now discuss whether Congress intended this statute to create a right to trial by jury. See *Lorillard*, 434 U.S. at 580.

Congress enacted section 1983 in 1871. Mirroring the split then existing between courts of law (trial by jury) and courts of equity (bench trial), section 1983 gives aggrieved parties the right to bring an "action at law" or a "suit in equity." Logically then, plaintiffs who bring an action at law under section 1983 have the right to a jury



trial. *See id.* at 583 (inferring statutory right to jury trial under ADEA because Congress provided specifically for "legal" relief).

Having held that section 1983 provides a jury trial for actions at law, we must next determine whether Del Monte's inverse condemnation action is one at law. Because section 1983 and the Seventh Amendment contain similar language, *see* U.S. Const. amend. VII (providing jury trial for "suits at common law"), we look to Seventh Amendment jurisprudence to assist our determination. We must ask whether an inverse condemnation claim can be compared to "suits at common law." *See Spinelli v. Gaughan*, 12 F.3d 853, 855 (9th Cir. 1993) (*Spinelli*) (jury right not limited to actions that actually existed at common law, but extends to actions analogous thereto); *Smith v. Barton*, 914 F.2d 1330, 1337 (9th Cir. 1990) (*Barton*), *cert. denied*, 501 U.S. 1217 (1991). To determine whether an inverse condemnation claim is analogous to a common-law action, we examine "the nature of the action and the remedy sought." *Barton*, 914 F.2d at 1337; *see also Spinelli*, 12 F.3d at 855.

As to the nature of the action, the City and amicus State of California argue that inverse condemnation actions are analogous to eminent domain actions, for which there is no right to a jury trial. Eminent domain proceedings, however, are actions at law. 5 James Wm. Moore, *Moore's Federal Practice* ¶¶ 38.12[5], 38.32[1] (2d ed. 1995). Such proceedings are not tried before a jury because the United States traditionally is a party. *Id.* ¶ 38.32[1]; *see also KLK*, 35 F.3d at 456. Thus, merely because inverse condemnation actions are similar to eminent domain actions, *see Agins v. City of Tiburon*, 447 U.S.

255, 258 & n.2 (1980), does not necessarily lead to the result that they are not "actions at law" triable by a jury.

Indeed, the similarities between eminent domain and inverse condemnation suggest that the latter derives from common law. Eminent domain has been characterized as a "trespass committed by the sovereign, and lawful only on the condition that the damages inflicted by the trespass are paid to the injured party." *Beatty v. United States*, 203 F. 620, 626 (4th Cir. 1913), *cert. denied*, 232 U.S. 463 (1914). Actions brought for trespass are common-law actions. 5 *Moore's Federal Practice* ¶ 38.11[5]. Similarly, both eminent domain and inverse condemnation actions resemble common-law actions for trover to recover damages for conversion of personal property, and detinue and replevin. *See id.*

More important than the nature of the claim is the second inquiry: the type of remedy sought. *Spinelli*, 12 F.3d at 855-56; *Barton*, 914 F.2d at 1337; *see also Tull v. United States*, 481 U.S. 412, 421 (1987). Del Monte seeks compensatory or "legal" damages. *See Barton*, 914 F.2d at 1337, *citing Curtis v. Loether*, 415 U.S. 189, 196 (1974). Because legal relief is available and legal rights are asserted, we conclude that Del Monte's inverse condemnation action is an "action at law." *See* 42 U.S.C. § 1983; *Lorillard*, 434 U.S. at 583. Thus, Del Monte was entitled to have a jury try its inverse condemnation claim.

The City also argues that, even if Del Monte's inverse condemnation claim is a common-law action, Federal Rule of Civil Procedure 71A requires the district court to determine liability. Rule 71A, however, applies only to eminent domain proceedings. *KLK*, 35 F.3d at 457.

Because we hold that the district court did not err by allowing Del Monte's section 1983 action to be tried before a jury, we conclude that it properly denied the City's motion for a new trial based on the opposite contention.

## B.

The City next argues that regardless of whether section 1983 provides a right to a jury trial, the district court should not have submitted the issue of liability to the jury because it presents questions of law. Before addressing the merits of this argument, we point out that even if the district court improperly submitted an issue of law to the jury, the City's remedy is not necessarily a new trial. We may remand to the district court for it to enter necessary factual findings and conclusions of law. *See* 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2887 at 476 (1995).

To prevail on its inverse condemnation claim, Del Monte had to show that the City's actions (1) did not substantially advance a legitimate public purpose; or (2) denied it economically viable use of its property. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987). The jury's verdict on Del Monte's inverse condemnation claim did not differentiate between the two theories of liability; we may uphold the verdict on that claim if substantial evidence supports each theory of liability. *Syufy Enterprises*, 793 F.2d at 1001. We first examine whether the district court properly submitted each of the above theories to the jury.

No circuit precedent directly addresses whether a jury may decide these issues. Both inquiries present mixed questions of law and fact, which may be submitted to the jury if they are essentially factual, even if they implicate constitutional rights. *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273, 288-90 (1982) (discriminatory intent in a civil rights action is question of fact); *United States v. Moreno*, 742 F.2d 532, 537 (9th Cir. 1984) (*Moreno*) (Wallace, J., concurring) (Fourth Amendment seizure issue appropriate for the trier of fact); *cf. United States v. McConney*, 728 F.2d 1195, 1202-04 (9th Cir.) (en banc) (*McConney*) (standard of review applied to mixed questions of law and fact depends on whether inquiry is "essentially factual"), *cert. denied*, 469 U.S. 824 (1984); *but see Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (*Bateson*).

In the more specific context of eminent domain and inverse condemnation, the Supreme Court has provided some insight into the nature of Del Monte's claim. For example, the Court has repeatedly observed that whether government action has deprived a claimant of his property without just compensation is an "essentially ad hoc, factual inquir[y]." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (*Lucas*); *see also Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (*Penn Central*); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 473-74 (1987); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Thus, we begin with some direction: the questions presented here ordinarily are essentially factual. This points us toward the use of the jury despite the questions being ones of mixed law and fact.



With this background, we turn first to determining whether the existence of an economically viable use falls within the category of essentially factual questions, which may be submitted to a jury. We hold that it does. See *Williamson Cy. Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 182-83 (1985) (recognizing jury finding of no economically viable use); see also *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992) (economically viable use inquiry "necessarily entails complex factual assessments"); *Sadowsky v. City of New York*, 732 F.2d 312, 317 (2d Cir. 1984) (*Sadowsky*) (whether a taking has occurred is essentially a factual inquiry). Thus, even though this inquiry presents a mixed question of fact and law, the district court did not err by submitting it to the jury.

We next turn to the second theory of liability for inverse condemnation: whether the City's actions substantially advanced a legitimate public purpose. The City urges us to analogize this inquiry to that undertaken by courts addressing substantive due process claims, which the City submits must be determined by the court. But our precedent does not provide a clear answer as to whether substantive due process claims are jury questions. Compare *Bateson*, 857 F.2d at 1302-03 (reviewing de novo issue whether government actions were "arbitrary or capricious" for purposes of establishing substantive due process claim in takings context), with *Hoeck v. City of Portland*, 57 F.3d 781, 786 (9th Cir. 1995) (concluding that no reasonable jury could have found that the government violated plaintiff's substantive due process rights in takings context), *cert. denied*, 116 S. Ct. 910 (1996). Thus, the

City's analogy does not help us. Rather, referring to eminent domain and inverse condemnation cases appears to us to be a safer course.

In this case, the district court instructed the jury that the City's actions must substantially advance a legitimate public purpose. As there was no objection to how the court framed the instruction, we may begin our analysis of whether the issue is essentially factual by focusing on the instruction itself. The court stated:

Public bodies, such as the city, have the authority to take actions which substantially advance legitimate public interest and legitimate public interest can include protecting the environment, preserving open space agriculture, protecting the health and safety of its citizens, and regulating the quality of the community by looking at development. So one of your jobs as jurors is to decide if the city's decision here substantially advanced any such legitimate public purpose.

The regulatory actions of the city or any agency substantially advances a legitimate public purpose if the action bears a reasonable relationship to that objective.

Now, if the preponderance of the evidence establishes that there was no reasonable relationship between the city's denial of the claims proposal and legitimate public purpose, you should find in favor of the plaintiff. If you find that there existed a reasonable relationship between the city's decision and a legitimate public purpose, you should find in favor of the city. As long as the regulatory action by the city substantially advances their legitimate public



purpose, and its underlying motives and reasons are not to be inquired into.

Now, in analyzing whether plaintiff's right to compensation has been violated, that is the property was taken, you are entitled to consider the [extent] to which the city, in its regulation, interfered with the plaintiff's reasonable distinct investment ~~back~~[ed] expectations. So those are your instructions of the law with respect to the taking . . . claim.

The jury was instructed to find that the City's actions substantially advanced a legitimate state interest if it found that there was a "reasonable relationship" between the City's denial of Del Monte's application and a legitimate public purpose. The legitimate purposes – a legal determination – were defined in the instructions. The jurors were left with a reasonableness determination: was the denial reasonably related?

The nature of this reasonableness determination was clarified by the Supreme Court in its most recent venture into the issue before us. In *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (*Dolan*), the Court acknowledged that most state courts used the "reasonable relationship" test in determining the necessary nexus between legitimate governmental interests and a permit condition. *Id.* at 2319. The Court did not disapprove this test but, for Fifth Amendment purposes, proposed "rough proportionality" as an adequate term. *Id.* The Court advised that "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at

2319-20. This description seems to indicate that the inquiry is essentially factual. *See also id.* at 2321 ("We conclude that the findings upon which the city relies do not show the required reasonable relationship. . . .").

As the district judge pointed out, whether the issue of advancement of a legitimate public purpose is one for the jury or court is close. However, the issue submitted to the jury was largely a reasonableness inquiry; whether the government's actions are "reasonable" is often a jury issue. *See, e.g., Chew v. Gates*, 27 F.3d 1432, 1443 (9th Cir. 1994) (whether release of police dog on individual was reasonable under the Fourth Amendment is a question for the jury), *cert. denied*, 115 S. Ct. 1097 (1995); *Waller v. Kincheloe*, 987 F.2d 589, 593 (9th Cir. 1993) (whether prisoner searches are reasonably related to legitimate penological goal is question for the jury); *Parks v. Watson*, 716 F.2d 646, 654 n.4 (9th Cir. 1983) (whether city's action was rationally related to a public purpose is question of fact).

Because the reasonableness issue in this case is essentially "fact-bound [in] nature," *Moreno*, 742 F.2d at 537 (Wallace, J., concurring), is "essentially factual," *McConney*, 728 F.2d at 1202, and is founded largely "on the application of the fact-finding tribunal's experience with the mainsprings of human conduct," *Commissioner v. Duberstein*, 363 U.S. 278, 289 (1960), we conclude that, although a mixed question of fact and law, it is the type of issue that can be put to the jury. The district court did not err.

## IV

We next review de novo the district court's denial of the City's motion for judgment notwithstanding the verdict on Del Monte's inverse condemnation claim. Our role is the same as that of the district court. *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455, 1460 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2163 (1994). Judgment in favor of the City is proper if the evidence, construed in the light most favorable to Del Monte, permits only one reasonable conclusion, and that conclusion is contrary to the jury's. See *Bank of the West v. Valley Nat'l Bank of Arizona*, 41 F.3d 471, 477 (9th Cir. 1994).

## A.

"[T]he Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of his land." *Lucas*, 505 U.S. at 1016 (internal quotations and emphasis omitted). Even if the City had a legitimate interest in denying Del Monte's development application, its action must be "roughly proportional" to furthering that interest. *Dolan*, 114 S. Ct. at 2319. That is, the City's denial must be related "both in nature and extent to the impact of the proposed development." *Id.* at 2319-20. For the purposes of reviewing the district court's denial of the City's motion for judgment notwithstanding the verdict, we assume that the City's stated interests of protecting the environment and health and safety of its citizens were legitimate. See *Penn Central*, 438 U.S. at 125 (health and safety concerns are legitimate public purposes); *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 169

(4th Cir. 1991) (protection and preservation of beach areas are legitimate public purposes), *cert. denied*, 505 U.S. 1219 (1992).

To show that the essential nexus between the City's actions and its interests was lacking, Del Monte presented evidence that none of the City's stated reasons for denying its application was sufficiently related to the City's legitimate interests. The City first denied Del Monte's application because the proposed development would require sand relocation and grading in the "bowl" area of the property, which was the lowest lying area, roughly near the property's center. According to the City, such disruptions would result in "significant environmental impacts that are not mitigable nor adequately addressed." See *Del Monte Dunes I*, 920 F.2d at 1504. Del Monte presented evidence, however, that not only had the City Council and the Department of Public Works previously approved the grading plan, but numerous studies showed that the environmental impact on the Dunes caused by grading was either not significant or mitigated by the dedication of other areas of the Dunes to open space.

Second, the City denied Del Monte's permit because it determined that the proposed development would have significant impacts on the native flora and fauna, which were not adequately mitigated by the proposal. *Id.* Del Monte presented the jury with evidence that the proposed development would not significantly harm the property's environmental balance. It also reminded the jury that the City had already approved Del Monte's environmental restoration plan in 1984 and that Del Monte had complied with the planning staff's request to



ensure that environmental damage was unlikely. The jury was entitled to credit Del Monte's experts, and discredit the City's testimony. See *Oviatt v. Pearce*, 954 F.2d 1470, 1473 (9th Cir. 1992) (*Oviatt*).

Third, the City denied Del Monte's application because it determined that the proposed development did not provide adequate access to and from the property. *Del Monte Dunes I*, 920 F.2d at 1504. Del Monte and the City presented conflicting evidence as to who had responsibility for providing access. Del Monte's architect, Paul Davis, testified that Del Monte's access plan merely relied on what the City had told Del Monte it wanted. The City's plan would have required Del Monte to construct an access road that crossed property belonging to other landowners. Del Monte contends that the City had known this since 1982 or 1983, but that it had done nothing to condemn the property needed for the access road. Because development of the access road depended on the City taking further action, Del Monte argued it was an improper reason to deny its development permit.

Fourth, the City denied Del Monte's application because it determined that the proposed development was "likely to cause substantial environmental damage and substantially injure the habitat of the endangered Smith's Blue Butterfly." *Id.* Del Monte's environmental expert, Dr. Donald Bright, testified to the contrary. He first testified that he and his team had located only one Smith's Blue Butterfly on the property, in 1984. He then testified that he did not believe that the proposed development would jeopardize the continued existence of the Smith's Blue Butterfly, which confirmed the conclusion already reached by the United States Fish and Wildlife

Service. In January 1986, a staff report to the City Planning Commission concluded that Dr. Bright's restoration plan satisfied the environmental conditions previously imposed in 1984.

Fifth, the City denied Del Monte's application because it determined that the proposed project was not in conformance with the General Plan as it did not protect native flora and fauna. *Id.* Davis testified that nothing but the size of the proposed project changed between 1984, when the City conditionally approved Del Monte's application, and 1986, when the City finally denied it. Davis further testified that the City's environmental impact report of 1982 found no significant impact to native flora and fauna as a result of Ponderosa Homes' 344-unit proposed development; thus, it made little sense to find significant impact due to the smaller, 144-unit proposed development.

Finally, the City summarily stated that Del Monte's project would have a "significant impact on the environment, and no demonstration of overriding considerations has been made which would support approval of this project." *Id.* at 1504-05. This factor appears duplicative of other reasons given for the City's denial of Del Monte's application concerning preservation of habitat for the Smith's Blue Butterfly and other native flora and fauna.

We conclude that Del Monte provided evidence sufficient to rebut each of these reasons. Taken together, Del Monte argued that the City's reasons for denying their application were invalid and that it unfairly intended to forestall any reasonable development of the Dunes. See *id.* at 1508. In light of the evidence proffered by Del Monte,

the City has incorrectly argued that no rational juror could conclude that the City's denial of Del Monte's application lacked a sufficient nexus with its stated objectives. Significant evidence supports Del Monte's claim that the City's actions were disproportional to both the nature and extent of the impact of the proposed development. See *Dolan*, 114 S. Ct. at 2319.

## B.

The jury also could have found the City liable for a taking because it denied Del Monte all economically viable use of its property. Where such a taking is absolute, no inquiry into the state's interests advanced in support of the regulation is required. *Lucas*, 505 U.S. at 1015-16; *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 473 n.4 (9th Cir. 1994). The Supreme Court has suggested that where an owner is denied only some economically viable uses, a taking still may have occurred where government action has a sufficient economic impact and interferes with distinct investment-backed expectations. *Lucas*, 505 U.S. at 1019-20 n.8; see also *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 616 (9th Cir. 1993) (*Outdoor Systems*), citing *Penn Central*, 438 U.S. at 124. Traditionally, the type of governmental interference also is considered a factor relevant to the takings inquiry. See *Penn Central*, 438 U.S. at 124.

"[T]he term 'economically viable use' has yet to be defined with much precision." *Outdoor Systems*, 997 F.2d at 616. Generally, however, the existence of permissible uses determines whether a development restriction denies a property owner economically viable use of his

property. *Id.* The Supreme Court explained in *Lucas* that this rule is justified because the "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017; see also *id.* ("For what is the land but the profits thereof?") (internal quotations and alterations omitted). Thus, compensation is required where regulations "leave the owner of land without economically beneficial or productive options for its use - typically . . . by requiring land to be left substantially in its natural state - [which suggests] that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* at 1018; see also *Dolan*, 114 S. Ct. at 2316.

The City initially argues that because Del Monte sold the Dunes to the State of California for \$800,000 more than it paid, economically viable uses for the property must have existed. Thus, according to the City, the jury's finding that a taking occurred was precluded as a matter of law. However, it is not difficult to conceive of a circumstance in which there are no economically viable uses for a piece of property, but the property owner can sell it to the government at a higher price than what he paid for it. For example, in conjunction with a legislative moratorium on property development, a state might implement a "buy-out" program for environmentally sensitive property and purchase a landowner's property at a higher price than what the landowner originally paid. See *Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1320 & n.5 (D. Nev. 1992); see also *Lucas*, 505 U.S. at 1019 (listing federal and state statutes permitting acquisition of private lands for public use). A government buy-



out, of course, would not necessarily shield the government from the Takings Clause. Rather, the buy-out would likely implicate the issue of just compensation. Thus, a landowner who believed that the government bought out his property at an unfairly low price might choose to bring an action for just compensation. The fact that he already received some money from the government in return for his property does not establish as a matter of law that economically viable uses for his property remain or that a taking did not occur.

Focusing the economically viable use inquiry solely on market value or on the fact that a landowner sold his property for more than he paid could inappropriately allow external economic forces, such as inflation, to affect the takings inquiry. Indeed, several courts have found a taking even where the "taken" property retained significant value. See, e.g., *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1549-50 & n.9 (11th Cir.), *vacated and reh'g en banc granted*, 42 F.3d 626 (11th Cir. 1994); *Yancey v. United States*, 915 F.2d 1534, 1541 (Fed. Cir. 1990) (no set formula for determining how much diminution in value effects a taking); *Bowles v. United States*, 31 Fed. Cl. 37, 48-49 (1994); *Formanek v. United States*, 26 Cl. Ct. 332, 340-41 (1992) (*Formanek*). Moreover, focusing solely on property values confuses the economically viable use inquiry with the diminution of value inquiry normally applied only where no categorical taking exists. See *Lucas*, 505 U.S. at 1019-20 n.8. Although the value of the subject property is relevant to the economically viable use inquiry, our focus is primarily on use, not value. See *Outdoor Systems*, 997 F.2d at 616 (existence of

permissible use determines whether economically viable use exists).

Similarly, the mere fact that there is one willing buyer of the subject property, especially where that buyer is the government, does not, as a matter of law, defeat a taking claim. See *Lucas*, 505 U.S. at 1018-20 & n.8 (implicitly rejecting a dissenter's view that the fact *Lucas* could have sold his property indicated no taking occurred); see also *Formanek*, 26 Cl. Ct. at 340 (offers for property for "far less than the value of the property prior to government action and '[ ] not the product of negotiations between a willing buyer and seller under no duress' " do not defeat taking claim). Rather, we are assisted by the test applied by the Second Circuit, which looks to "whether the property use allowed by the regulation is sufficiently desirable to permit property owners to sell the property to someone for that use." *Park Ave. Tower Assoc. v. City of New York*, 746 F.2d 135, 139 (2d Cir. 1984) (internal quotations omitted), *cert. denied*, 470 U.S. 1087 (1985); *Sadowsky*, 732 F.2d at 318. We modify that test slightly, however, to emphasize that where, as *Del Monte* argued in this case, government action relegates permissible uses of property to those consistent with leaving the property in its natural state (e.g., nature preserve or public space), and no competitive market exists for the property without the possibility of development, a taking may have occurred. See *Formanek*, 26 Cl. Ct. at 340; see also *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1330-31 (9th Cir. 1977) (taking occurs where property rendered unsaleable in the open market); *Jed Rubinfeld, Usings*, 102 Yale L.J. 1077, 1157 (1993) (discussing analogy between condemned land and land required to be left in

its natural state). We now apply these legal standards to the evidence Del Monte presented to the jury to determine whether sufficient evidence supports the jury's finding that the City's actions left Del Monte's property without an economically viable use.

Del Monte contended that the City denied it all economically viable use of the Dunes by requiring it to leave the property in its natural state. As such, Del Monte argued that the Dunes was desirable only to the City or the State, which eventually converted the property into a public park. In support of its argument, Del Monte presented evidence establishing that the City progressively denied use of portions of the Dunes until no part remained available for a use inconsistent with leaving the property in its natural state.

First, Del Monte demonstrated that the City denied it the ability to build on the western one-third of the property, which fronted the ocean, because the City wanted to retain that property for public beach use and access. Although we recognize that the California Coastal Act also requires set-backs when developing beachfront property, Del Monte contended that it agreed to provide public walkways and to construct a parking lot for public use only in response to the City's demands. Del Monte also agreed to create a buffer zone between its planned development and the existing State park on the Dunes' northern border.

Del Monte also showed that the City's viewshed restrictions denied it the ability to build on other portions of the Dunes. Del Monte's architect Davis testified at length as to the City's requirements that Del Monte create

"view corridors" such that the planned development could not be seen from the highway. Creating the view corridors required Del Monte to locate the development in the lowest elevated area of the property, also called the "bowl" area. Finally, Del Monte presented the jury with evidence that the City denied it any use of the bowl area because of the risk of damage to buckwheat plants, the natural habitat of the endangered Smith's Blue Butterfly.

Del Monte also presented evidence illustrating that it had complied with all fifteen conditions imposed by the City in its 1984 resolution granting Del Monte an extension on its conditional use permit. *See Del Monte Dunes I*, 920 F.2d at 1503. Del Monte also demonstrated, through the testimony of Davis and other experts, that its proposed 190-unit development complied with each of the City's bases for denying Del Monte's application in 1986. *See id.* at 1504, 1506 (concluding that Del Monte provided evidence that they substantially fulfilled the City's conditions). As a result of the City's denial of the development application, Del Monte concluded that the Dunes was no longer commercially marketable.

Because this evidence, viewed in the light most favorable to Del Monte, supports the jury's finding that the City's actions denied all economically viable use of the Dunes, we affirm the district court's denial of the City's motion for a judgment notwithstanding the verdict. The jury essentially accepted Del Monte's argument that the City forced Del Monte to bear the burden of creating open space for the public to enjoy. *See Dolan*, 114 S. Ct. at 2316.



The City also argues that the jury could not have concluded that the City's actions denied Del Monte all economically viable uses of the property because Del Monte failed to submit an application proposing a less-intrusive development. The City contends that "the evidence proffered by [Del Monte] provided no basis for a reasonable jury to conclude that the City Council's decision in June of 1986 precluded any future residential development or other use of the subject property." To the contrary, we already have held that Del Monte's taking claim was ripe because requiring Del Monte to submit a new application was futile. *Del Monte Dunes I*, 920 F.2d at 1502-06. Moreover, Davis and Del Monte's engineer, John Van Zander, testified that the combination of the City's requirements made any development of the Dunes impossible. Davis stated that after five years of negotiating with the City, he and others working on the development "felt basically that the door was shut, that the City Council did not want residential development on this site." He continued: "[T]here was no way of meeting any position of the City that [the Dunes] should be open space. There was no way of planning for any residential development on [the Dunes]. . . . There was no way to come back with a plan." Similarly, Van Zander told the jury that leaving areas available for public space, environmental habitat, and view corridors, made it impossible to design any plan for residential development of the Dunes. Viewing this evidence in the light most favorable to Del Monte, the jury could conclude that additional development applications would have been futile, as did we in *Del Monte Dunes I*.

In sum, we conclude that the jury was not compelled to find that the City's actions left Del Monte with an economically viable use of the Dunes. As the land was zoned for multi-unit residential use, once the jury determined that it was unusable for that purpose, it was entitled to conclude that the City's actions had effected a taking. See *Outdoor Systems*, 997 F.2d at 616-17 (including among property owner's permissible uses those permitted by state law); see also *Lucas*, 505 U.S. at 1017 n.7 (owner's reasonable expectations shaped by uses permitted by state law).

## V

Finally, the City argues that the district court abused its discretion by denying its motion for a new trial because the jury awarded Del Monte excessive damages. Not only do we review the district court's denial of a motion for a new trial for an abuse of discretion, *California Sansome*, 55 F.3d at 1405, we allow substantial deference to a jury's finding of the appropriate amount of damages. *Los Angeles Memorial Coliseum Comm'n v. NFL*, 791 F.2d 1356, 1360 (9th Cir. 1986), cert. denied, 484 U.S. 826 (1987). We must uphold the jury's finding unless the amount is grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork. *Id.*

The district court instructed the jury to determine damages in an amount that would compensate Del Monte for the delay the City caused in Del Monte's efforts to develop the Dunes. The jury awarded Del Monte \$1,450,000. The City contends that these damages are

excessive because (1) the jury was permitted to consider delay damages for a period extended up to the date of trial; (2) Del Monte's experts' opinions on the property's value both before and after the City's actions were contrary to the weight of the evidence; and (3) Del Monte's experts were erroneously allowed to assume that there was a reasonable probability that the California Coastal Commission (Coastal Commission) would have approved Del Monte's proposed development.

The record refutes the City's arguments. First, the district court refused to decide the relevant length of time for determining delay damages, concluding that this was an issue for the jury. The City has no factual basis upon which to argue what length of the time the jury found relevant. Second, Del Monte's experts testified that the more progress Del Monte made in the application process the more valuable the Dunes became. The jury was entitled to infer from this evidence that Del Monte's progress toward permit approval, up until 1986 when the City conclusively denied the application, could account for an appreciation rate higher than the eight to ten percent Del Monte's experts said was an "average" rate of return.

Finally, the City's contention that Del Monte's experts erroneously assumed that the Coastal Commission would approve the development was refuted by expert testimony. There is ample evidence upon which the jury could conclude that approval by the Commission was likely. *See Oviatt*, 954 F.2d at 1473 (within the jury's province to determine credibility of witnesses).

Because the City has not shown that the damages award is grossly excessive, clearly not supported by the

evidence, or speculative, we affirm the district court's denial of the City's motion for a new trial on damages.

AFFIRMED.

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APPENDIX B

VOLUME 4  
PAGE 438 TO 561

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES A. LEGGE,  
JUDGE

DEL MONTE DUNES AT	)	
MONTEREY, LTD. AND	)	
MONTEREY-DEL MONTE	)	
DUNES CORPORATION,	)	NO. C-86-5042 CAL
PLAINTIFFS,	)	
VS.	)	
CITY OF MONTEREY,	)	
DEFENDANT.	)	
_____	)	

SAN FRANCISCO, CALIFORNIA  
MONDAY, JANUARY 31, 1994

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:

FREDERIK A. JACOBSEN, ESQ.  
520 SOUTH EL CAMINO REAL, STE. 630  
SAN MATEO, CA 94402

FOR DEFENDANT:

GEORGE A. YUHAS, ESQ.  
LISA A. WILCOX, ESQ.  
ORRICK, HERRINGTON & SUTCLIFFE  
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SAN FRANCISCO, CA 94111-3142

REPORTED BY:

LAWRENCE J. WHITE, CSR, CP, CM  
OFFICIAL REPORTER, USDC

COMPUTER-AIDED TRANSCRIPTION BY TURBOCAT  
[p. 439] MONDAY, JANUARY 31, 1994 1:45 P.M.

THE COURT: GOOD AFTERNOON.

MR. JACOBSEN: GOOD AFTERNOON.

MR. YUHAS: GOOD AFTERNOON.

THE COURT: WE ARE STILL MISSING ONE JUROR. LET ME GIVE YOU MY READ ON THIS QUESTION OF WHAT HAS TO BE DECIDED BY THE JURY AND WHAT I WILL RESOLVE. STRANGELY INTERESTING QUESTION.

WHAT I SEE ARE A COUPLE OF LINES OF AUTHORITY CONVERGING FROM DIFFERENT STARTING POSITIONS, AND I'M NOT SURE THAT THE BODY OF LAW IS REALLY CONSISTENT. I THINK THE FIRST CUT AT THIS, THOUGH, IS TO TAKE A LOOK AT THE RIGHT TO A JURY TRIAL AS DETERMINED BY THE NATURE OF THE CASE.

NOW, IT SEEMS TO ME THAT IN FEDERAL CONDEMNATION ACTIONS I THINK IT'S QUITE CLEAR THERE IS NO RIGHT TO A JURY, EXCEPT ON THE DAMAGES QUESTION. THESE ARE SO-CALLED SPECIAL PROCEEDINGS.

WHAT THE SUPREME COURT SAID IN U.S. AGAINST REYNOLDS OR REYNOLDS AGAINST THE U.S. AND THE BODY OF PROCEDURE PUT INTO FEDERAL RULE OF CIVIL PROCEDURE 71-A SEEMS TO

COVER IT. I THINK THAT WILL ALSO - AS PRINCIPLES WILL ALSO PROBABLY APPLY TO INVERSE CONDEMNATION CASES BROUGHT AGAINST THE FEDERAL AUTHORITY. BUT WE ARE HERE CONCERNED WITH THE ACTIONS NOT OF FEDERAL AUTHORITY, BUT OF THE STATE AND LOCAL [p. 440] GOVERNMENTAL AGENCIES. ALBEIT, OF COURSE, THIS IS BASED UPON FEDERAL CONSTITUTIONAL PRINCIPLES, STILL THE JURISDICTION IN THIS COURT, I THINK, IS PRIMARILY SECTION 1983. IT ISN'T QUITE PLEADED THAT WAY IN THIS COMPLAINT, BUT IT SEEMS TO ME THAT HAS GOT TO BE THE GENESIS OF THIS COURT'S JURISDICTION.

I THINK THE NINTH CIRCUIT HAS BEEN SAYING, QUITE RECENTLY IN THE ADSULZ (PHONETIC) CASE IN THIS CIRCUIT, THAT WHEN WE ARE TALKING ABOUT THESE LAND CASES BY LOCAL AGENCIES, WE ARE TALKING ABOUT PRIMARILY, BUT NOT EXCLUSIVELY, 1983.

1983 PROVIDES FOR A JURY TRIAL ON ALL ISSUES. THAT'S AN INTERPRETATION OF A PROCEDURAL OR SPECIFIC GRANT OF JURISDICTION BY CONGRESS. SO WE ARE PRINCIPALLY HERE REVIEWING THE ACTIONS OF A STATE AND LOCAL AGENCY UNDER THE UNITED STATES CONSTITUTION, AND I THINK THAT'S INITIALLY A SECTION 1983 TYPE OF APPROACH.

NOW, I THINK FOR THAT REASON THAT A JURY TRIAL AT THIS STAGE IN THE ANALYSIS IS APPROPRIATE. THEN WE GET THE QUESTION WHETHER

EVEN THOUGH A JURY TRIAL IS AT LEAST BY VIRTUE OF THE NATURE OF THE CASE A PROPER METHOD, WHETHER SOME ISSUES SHOULD NEVERTHELESS BE DECIDED BY THE COURT BECAUSE IT'S AN ISSUE OF LAW, OR A MIXED QUESTION OF LAW AND FACT.

NOW, WE HAVE THE BASIC CAUSES OF ACTION HERE, SUBSTANTIVE CAUSES OF ACTION, OR SUBSTANTIVE DUE PROCESS TAKING AND EQUAL PROTECTION. WITH RESPECT TO SUBSTANTIVE DUE PROCESS, WE ALREADY HAVE A PRETTY WELL ESTABLISHED BODY OF LAW [p. 441] ON THE RELATIVE ROLE OF THE JURY VERSUS THE COURT, AND I HAVE ALREADY RULED ON THAT MATTER AND DETERMINED THAT THAT BODY OF LAW REQUIRES ME TO MAKE THE NECESSARY SUBSTANTIVE DUE PROCESS DECISIONS WITHOUT THE JURY.

HOWEVER, ON THE SUBJECTS OF TAKING AND EQUAL PROTECTION, I STILL THINK THAT THESE FALL ON THE JURY'S SIDE OF THE LEDGER. AND THIS IS NOT WITHOUT SOME DOUBTS. BUT I THINK THAT'S WHERE IT PROPERLY BELONGS. SOME OF THE QUESTIONS OVERLAP, SOME OF THEM INVOLVE SOME LEGAL ISSUES, OF COURSE, BUT THE FUNDAMENTAL QUESTION OF A TAKING AND THE FUNDAMENTAL QUESTION OF EQUAL PROTECTION, I THINK THE FACT-INTENSIVE NATURE OF BOTH THOSE DETERMINATIONS IN THIS CASE MEANS THAT IT SHOULD BE A JURY FUNCTION.

SO I'M DETERMINING THE ISSUE OF TAKING AND EQUAL PROTECTION WILL BE SUBMITTED TO



THE JURY. THAT IS, OF COURSE, SUBJECT TO MY POWERS UNDER RULE 50 TO DETERMINE AT THE END OF THE PLAINTIFFS' CASE WHETHER THERE HAS BEEN SUFFICIENT EVIDENCE TO SUBMIT TO THE JURY ON THOSE QUESTIONS.

MR. YUHAS: MAY I HAVE ONE CLARIFICATION?

THE COURT: YES.

MR. YUHAS: IN THE TAKINGS ANALYSIS, THERE ARE, OF COURSE, TWO COMPONENTS. ONE OF THEM DEALS WITH HOW IT IMPACTS THE AVAILABLE USES OR VALUE OF THE PROPERTY, AND THE OTHER ONE IS DOES THE ACTION ADVANCE LEGITIMATE STATE PURPOSE.

I ONLY RAISE THIS BECAUSE THE SECOND PRONG IS [p. 442] SOMEWHAT VERY CLOSE TO THE SUBSTANTIVE DUE PROCESS ANALYSIS. SO I WONDER EVEN IF THE FIRST GOES TO THE JURY, IF THE COURT IS RULING THAT THE SECOND PRONG ALSO GOES TO THE JURY.

THE COURT: YES, AT THE MOMENT, I AM. THE SECOND GOES TO THE JURY, TOO. SEEMS TO ME THAT THE ISSUE IS FAIRLY WELL - FACTUAL ISSUE IS FAIRLY WELL DEFINED HERE.

MR. JACOBSEN: YOUR HONOR, ON THIS SUBJECT, FOR PURPOSES OF SUPPLEMENTING THE RECORD - AND I KNOW YOUR HONOR HAS ANALYZED IT AND WRESTLED WITH THE QUESTION QUITE A BIT - FOR THE RECORD, WHEN YOUR HONOR WAS REFERRING TO THE FEDERAL RULE

71-A AND WHETHER THAT WOULD APPLY TO FEDERAL INVERSE, I THINK THE RECORD SHOULD REFLECT THAT ACTUALLY CONGRESS HAS SPOKEN TO THAT QUESTION.

WE DIDN'T SITE IT IN THE BRIEFS BECAUSE IT WASN'T IMPLICATED, BUT I THOUGHT I WOULD ADVISE YOUR HONOR THAT UNDER FEDERAL PRACTICE IF YOU WANT TO SUE THE FEDERAL GOVERNMENT IN INVERSE CONDEMNATION, CONGRESS HAS STATUTORILY ENACTED THAT AND GIVEN JURISDICTION TO THE CLAIMS COURT. THAT'S WHY YOU WOULDN'T SEE IN DISTRICT COURT INVERSE CLAIMS, BECAUSE CONGRESS HAS PUT THEM THAT WAY.

THE COURT: WHAT DOES THAT LEAVE WITH RULE 71-A? AS TO DIRECT CONDEMNATION, I GUESS.

MR. JACOBSEN: YES. BUT INVERSE FOR 1983. THEY HAVE GIVEN JURISDICTION TO THE DISTRICT COURT FOR INVERSE. THEY PUT IT IN THE COURT OF CLAIMS FOR REASONS THAT ESCAPE ME.

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APPENDIX C

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES A. LEGGE,  
JUDGE

DEL MONTE DUNES AT	)	
MONTEREY LTD., AND	)	
MONTEREY-DEL MONTE	)	NO. C 86-5042 CAL
DUNE CORPORATION,	)	
PLAINTIFF,	)	
VS.	)	
CITY OF MONTEREY,	)	
DEFENDANT.	)	

SAN FRANCISCO, CALIFORNIA  
FRIDAY, MARCH 4, 1994

FOR PLAINTIFF: LAW OFFICES OF  
FREDERIK A. JACOBSEN  
520 SOUTH EL CAMINO REAL,  
SUITE 630  
SAN MATEO, CALIFORNIA 94402  
BY: FREDERIK A. JACOBSEN,  
ESQ.

FOR DEFENDANT: ORRICK, HERRINGTON &  
SUTCLIFFE  
OLD FEDERAL RESERVE BANK  
BUILDING  
400 SANSOME STREET  
SAN FRANCISCO, CALIFORNIA  
94111-3143

BY: GEORGE A. YUHAS, ESQ.  
LISA A. WILCOX, ESQ.

REPORTER BY: JAMES J. YEOMANS, CSR  
OFFICIAL COURT REPORTER, USDC  
COMPUTERIZED TRANSCRIPTION  
BY XSCRIBE

\* \* \*

[p. 3] NATURE OF THE JURY SYSTEM AND THE JURY  
PROCESS, SO JUST FOR YOUR INFORMATION.

(PAUSE IN THE PROCEEDINGS)

THE COURT: NOW, DOES EITHER SIDE  
HAVE ANYTHING FURTHER YOU WOULD LIKE TO  
ADD WITH RESPECT TO THE DUE PROCESS CLAIM  
THAT I PREVIOUSLY DETERMINED IS MY RESPON-  
SIBILITY TO DECIDE RATHER THAN THE JURORS?

MR. YUHAS: I WOULD ONLY NOTE, IF THE  
COURT HAS NOT SEEN IT, THAT YESTERDAY COINCI-  
DENTLY THE 9TH CIRCUIT CAME DOWN WITH A  
NEW DECISION IN THE AREA OF SUBSTANTIVE DUE  
PROCESS. WHICH I THINK BASICALLY RESTATES THE  
BASIC STANDARDS THAT WE ARTICULATED IN SUP-  
PORT OF BOTH THE MOTION FOR SUMMARY JUDG-  
MENT AND REQUEST FOR TRIAL.

THAT CASE IS KAWAOKA, K-A-W-A-O-K-A.

THE COURT: DOES IT SAY ANYTHING DIF-  
FERENT FROM WHAT THE 9TH CIRCUIT SAID IN  
THIS CASE -



MR. JACOBSEN: I DON'T BELIEVE SO.

THE COURT: - ON PAGE 1508?

MR. YUHAS: NO, I DON'T BELIEVE SO.

MR. JACOBSEN: IF I MIGHT ADD, I DON'T - I'VE JUST HAD A CHANCE TO SKIM THE CASE, IT DIDN'T SPEAK TO THE ISSUE, I DON'T BELIEVE. MAYBE MR. YUHAS' READING HAS BEEN MORE THOROUGH.

I DON'T BELIEVE IT SPOKE TO THE ISSUE OF WHO DECIDES COURT VERSUS JURY. I THINK IT JUST TALKS TO THE STANDARD.

THE COURT: WE'RE BEYOND THAT POINT. RIGHT OR WRONG, [p. 4] ONE OF YOU MAY APPEAL THAT, BUT I WAS TALKING ABOUT WHAT STANDARD I SHOULD BE USING, SINCE I HAVE DECIDED WHAT STANDARD I SHOULD BE USING IN MAKING THAT DECISION.

ANYTHING FURTHER ON THE DUE PROCESS ISSUE?

MR. YUHAS: NOTHING, YOUR HONOR.

MR. JACOBSEN: NO. NOTHING FURTHER.

THE COURT: ALL RIGHT. THIS WILL BE MY FINDINGS OF FACT AND CONCLUSIONS OF LAW, AS WELL AS, I SUPPOSE, A STATEMENT OF REASONS AND OPINION.

IN CONNECTION WITH THE CLAIM FOR SUBSTANTIVE DUE PROCESS, WE HAD THE JURY'S VERDICT WITH RESPECT TO THE TAKINGS CLAIM AND

THE JURY'S VERDICTS WITH RESPECT TO EQUAL PROTECTION.

INITIALLY I WAS, AFTER THE VERDICT CAME IN, AFTER SEEING WHETHER ANY OF THE DECISIONS THERE COMPEL A CONCLUSION ON MY PART ONE WAY OR THE OTHER BASED UPON WHAT THE JURY DID.

I DON'T THINK SO. I THINK THE EQUAL PROTECTION CLAIM IS SORT OF A DIFFERENT CREATURE, THAT DOESN'T GET WRAPPED INTO THE PRESENT SUBSTANTIVE DUE PROCESS ANALYSIS.

AND THE TAKING CLAIM QUESTION IS A LITTLE CLOSER, BUT I THINK THAT BECAUSE OF THE DEFINITION OF TAKING AND THE ALTERNATIVE GROUNDS FOR A JURY - POSSIBLE GROUNDS FOR THE JURY HAVING FOUND FOR THE BEFORE, [sic] THAT I'M REALLY NOT BOUND BY OR IN DANGER OF INCONSISTENCY WITH THE JURY'S DECISION.

LOOKING AT THE INSTRUCTIONS WE GAVE THE JURY ON THE TAKING CLAIM THEY COULD HAVE FOUND A TAKING BASED UPON DENIAL [p. 5] OF ALL ECONOMICALLY VIABLE USE OR THE CITY'S DECISION TO REJECT THE PLAINTIFF'S DEVELOPMENT, NOT SUBSTANTIALLY ADVANCING A LEGITIMATE PUBLIC PURPOSE. SO I AM DOING IT INDEPENDENTLY OF WHAT THE JURY DECIDED AND BASED UPON THE EVIDENCE IN FRONT OF ME.

NOW, THE ISSUE OF SUBSTANTIVE DUE PROCESS IS ONE THAT WAS IDENTIFIED, AND TO A CERTAIN EXTENT, DEFINED BY THE COURT OF APPEALS IN

THE FIRST APPEAL AND THAT DEFINITION IS STANDARD.

OF COURSE, WILL [sic] BE THE LAW OF THE CASE FOR PURPOSES OF MY DECISION HERE.

I BELIEVE THAT THE APPROPRIATE STANDARD IS DEFINED IN PAGE - ON PAGE 1508, 697 FED 2D, THAT IS THE PRIOR APPEAL OF THIS CASE AND DEALS WITH THE QUESTION OF WHETHER THE DECISION BY THE CITY WAS ARBITRARY AND IRRATIONAL OR WHETHER IT WAS A VALID REGULATORY REASON.

AND I THINK SORT OF PARENTHETICALLY THE COURT OF APPEALS SAID IT WAS REALLY TO FORESTALL ANY REASONABLE DEVELOPMENT AND, IN ESSENCE, WAS A COVERUP TO KEEP THE PROPERTY OPEN SPACE.

NOW, I'VE ALREADY DECIDED THAT THIS DUE PROCESS ISSUE IS ONE FOR ME TO DECIDE AS A COURT RATHER THAN AS A JURY, AND MY REASONS FOR DOING THAT HAVE BEEN PUT ON THE RECORD SOME TIME AGO.

NOW, OF COURSE, I'M DEALING WITH THE RESOLUTION OF THE CITY WHICH TURNED DOWN THE, I'LL SAY TURNED DOWN, THE [p. 6] DEVELOPMENT PLAN, THE RESOLUTION OF LOSS.

PRECISELY WHAT THE DATE IS, WHETHER IT WAS JUNE, I BELIEVE THE DECISION WAS ON JUNE 3RD 1986, BUT THE ACTUAL RESOLUTION WAS RECORDED OR ENTERED ON JUNE 17TH OF 1986.

THE LANGUAGE OF THAT RESOLUTION IS QUOTED ON PAGES 1504 AND 1505 OF THE 9TH CIRCUIT'S OPINION. I'M FINDING AND CONCLUDING THAT THE DEFENDANT DID NOT BREACH, DID NOT VIOLATE THE SUBSTANTIVE DUE PROCESS RIGHTS OF THE PLAINTIFFS, PLAINTIFF IN THE DECISION WHICH WAS MADE. I BELIEVE THE FOLLOWING REASONS ARE SIGNIFICANT.

FIRST OF ALL, IT'S OBVIOUS TO ME FROM THE RECORD THAT CONSIDERABLE TIME, I MEAN, EXHAUSTIVE TIME AND ENERGY WAS SPENT BY THE STAFF OF THE CITY AND BY ITS PLANNING COMMISSION IN WORKING ON THIS DEVELOPMENT. AND I THINK IT WAS ALL A SINCERE EFFORT BY THOSE PEOPLE AND I DON'T THINK NOT BEING DONE FOR VALID REGULATORY REASONS OR WAS ATTEMPTING TO FORESTALL ANY DEVELOPMENT.

I THINK IT'S ALSO OBVIOUS FROM THE TESTIMONY I HEARD AND FROM EXHIBITS I READ THAT THE STAFF IN THIS PRE-CONSIDERATION WORK OFTEN ASSISTED THE PLAINTIFFS IN ATTEMPTING TO RESOLVE THEIR PROBLEMS WITH THE COASTAL COMMISSION AND PERHAPS ALSO WITH THE FISH AND GAME AND FISH AND WILDLIFE.

NOW, ONE MIGHT SAY, WELL, IS IT RELEVANT WHAT THE STAFF DID? IS IT ONLY THE RESOLUTION AND MOTIVATION FOR THE RESOLUTION?

[p. 7] WELL, THAT'S AGRUABLE, [sic] BUT I THINK THE QUANTITY OF TIME AND MONEY INVESTED BY THE BOARD'S, IN ESSENCE, THE BOARD'S EMPLOYEES, IS DEMONSTRATIVE OF CONDUCT



WHICH IS NOT ARBITRARY AND IRRATIONAL, BUT WAS FOR VALID PURPOSES.

WE ALSO HAVE THE FACT THAT THE SMITH'S BUTTERFLY (PHONETIC) WAS AND, I GUESS, IS AN ENDANGERED SPECIES, AND THERE WERE DIFFERENCES OF OPINION ON WHAT TO DO ABOUT IT.

FOR EXAMPLE, EXHIBIT 120. I THINK IT WAS STILL AN OPEN QUESTION AS TO WHAT THE COASTAL COMMISSION MIGHT HAVE DONE. THAT IS, AT 1986 I THINK IT WAS STILL AN OPEN QUESTION AS TO WHAT THE COASTAL COMMISSION COULD HAVE DONE.

THE LAST COMMUNICATION, I BELIEVE, FROM THE COASTAL COMMISSION WAS IN 1984, AND I'M REFERRING SPECIFICALLY TO EXHIBITS 48 AND 82.

THERE WERE ALSO NOT FINAL APPROVALS IF THEY WERE NEEDED. I GUESS THEY WERE NOT REALLY NEEDED, BUT THERE WERE NO FINAL BLESSINGS BY THE U.S. FISH AND WILDLIFE. REFERRING TO EXHIBITS 85, 134, 135 AND 145.

AND I THINK THAT IT IS APPARENT THAT THE STATE DEPARTMENT OF FISH AND GAME DID OPPOSE, AND I REFER NOT JUST TO THE TESTIMONY GIVEN IN COURT, BUT ALSO TO THE EXHIBITS, 147 AND, I BELIEVE, 149.

IN ADDITION, OTHER ORGANIZATIONS HAD OPPOSED DEVELOPMENT. EXHIBIT 146 DEMONSTRATES THE SIERRA CLUB'S POSITION FOR VARIOUS REASONS.

[p. 8] SO I THINK THAT THE CITY COUNCIL WAS NOT ACTING ARBITRARY AND IRRATIONALLY IN PASSING A RESOLUTION IN JUNE 1986, IT WAS ACTING FOR VALID REGULATORY REASONS AND NOT ATTEMPTING TO FORESTALL ALL REASONABLE DEVELOPMENT.

SO FOR THAT REASON I'M GOING TO FIND IN FAVOR OF THE DEFENDANT ON THAT ISSUE.

NOW, WHERE ARE WE WITH RESPECT TO THE POST-TRIAL MATTERS, JUDGMENT, POST-TRIAL MOTIONS, ET CETERA?

\* \* \*

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**APPENDIX D**  
**FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

DEL MONTE DUNES AT	)	No. 94-16248
MONTEREY, LTD., et al.,	)	
Plaintiff-Appellee,	)	D.C. No.
	)	CV-86-05042-CAL
-vs-	)	
CITY OF MONTEREY,	)	
Defendant-Appellant.	)	
<hr/>		
DEL MONTE DUNES AT	)	No. 94-16313
MONTEREY, LTD., and	)	
MONTEREY-DEL MONTE	)	
DUNES CORPORATION,	)	
Plaintiffs-Appellants,	)	<u>ORDER</u>
	)	(Filed
-vs-	)	Jun. 26, 1997)
CITY OF MONTEREY,	)	
Defendant-Appellee.	)	
<hr/>		

Before: WALLACE and LEAVY, Circuit Judges, and  
 BAIRD,\* District Judge.

The petition for rehearing is granted. No further briefing is required. The parties shall be prepared to argue, for no more than 20 minutes per side, the following issue:

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\* Honorable Lourdes G. Baird, United States District Judge,  
 Central District of California, sitting by designation.

Whether the jury, rather than the judge, can decide if the City of Monterey's actions substantially advanced a public purpose. (See part IIIB. of our opinion.)

Arguments shall be held in San Francisco on August 6, 1997, at 10:00 a.m. The parties shall direct any further questions to the Clerk of the Court.

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**APPENDIX E**  
**FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

---

DEL MONTE DUNES AT MONTEREY,  
 LTD., et al.,

*Plaintiff-Appellee,*

v.

CITY OF MONTEREY,

*Defendant-Appellant.*

---

No. 94-16248

D.C. No.

CV-86-05042-CAL

---

DEL MONTE DUNES AT MONTEREY,  
 LTD., and MONTEREY-DEL MONTE  
 DUNES CORPORATION,

*Plaintiffs-Appellees,*

v.

CITY OF MONTEKEY,

*Defendant-Appellee.*

---

No. 94-16313

ORDER

Filed October 28, 1997

Before: J. Clifford Wallace and Edward Leavy,  
 Circuit Judges, and Lourdes G. Baird,\* District Judge.

---



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\* Honorable Lourdes G. Baird United States District Judge,  
 Central District of California, sitting by designation.

**ORDER**

The panel reheard oral argument in this case on August 6, 1996. The panel has voted not to amend its opinion. The panel has unanimously recommended that the suggestion for rehearing en banc be rejected.

The full court has been advised of the suggestion for rehearing en banc. An active judge called for an en banc vote and a majority of the judges of the court has voted to reject the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The opinion in this case will not be amended, and the suggestion for rehearing en banc is rejected.

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Supreme Court, U.S.

FILED

FEB 27 1998

CLERK

No. 97-1235

In The  
**Supreme Court of the United States**  
October Term, 1997

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CITY OF MONTEREY,

*Petitioner,*

v.

DEL MONTE DUNES AT MONTEREY, LTD. AND  
MONTEREY-DEL MONTE DUNES CORPORATION,

*Respondents.*

---

On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

---

BRIEF IN OPPOSITION

---

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## I. INTRODUCTION

Petitioner City of Monterey's Petition for Writ of Certiorari does not justify the exercise of this Court's jurisdiction over a routine civil rights action that happens to involve a property owner plaintiff.

The Ninth Circuit faithfully followed this court's holdings in affirming the verdict, ruling that liability in a takings case is unavoidably an ad hoc factual inquiry. *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422, 1428 (9th Cir. 1996) (hereafter *Del Monte Dunes II*). The authorities relied upon by the Ninth Circuit, and ignored by the City, establish that such factual questions of liability in federal civil rights actions are properly decided by the jury. A recent *en banc* decision in the Ninth Circuit affirms this principle.

The City also tortures the Ninth Circuit's opinion to argue that traditional standards governing inverse condemnation actions were not properly applied in reviewing the verdict. The Ninth Circuit did nothing of the sort. The jury instruction, *submitted by the City at trial*, correctly set forth the applicable standards for determining whether a taking had occurred. *Del Monte Dunes II* at 1429. The Ninth Circuit's discussion of *Dolan v. City of Tigard*, 512 U.S. 374 (1994) in that connection did not impose a new standard on the City because *Dolan* merely clarified, but did not change, the traditional standard.

The parade of horrors imagined by the City are unseemly and unfounded. Given that juries routinely decide municipal liability in a wide spectrum of civil rights actions, it is illogical to suggest that juries are



incapable of deciding constitutional liability only in takings cases. Moreover, as a practical matter, the Ninth Circuit's decision has little effect on the governments that have raised such a shrill cry herein. The State of California is immune from suit under 42 U.S.C. § 1983 because it is not a "person" as defined under the act and because the Eleventh Amendment bars damages suits against the State in federal courts. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) requires property owners to pursue state remedies for alleged takings in state courts. Thus state law regarding injuries will govern takings claims against California local governments. The only reason that this action was tried under the federal civil rights act was that, at the time of the 1986 denial of Del Monte Dunes development proposal, California did not provide a monetary remedy for inverse condemnation. *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990) (hereafter *Del Monte Dunes I*). This Court's decision in *First English Evangelical Lutheran Church v. City of Glendale*, 482 U.S. 304 (1987), which required California to provide a monetary remedy, will result in cases such as this being filed in state court, not federal, after 1987.

## II. THE LIABILITY ISSUES WERE PROPERLY TRIED TO THE JURY

The Ninth Circuit's analysis of the jury's ability to decide liability is correctly premised on the principle that takings liability is a factual inquiry. *Del Monte Dunes II* at 1428. Given that Del Monte Dunes sought damages, its

action was at law, and thus entitled to a jury determination of liability. *Id.* at 1427.

In *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), this Court foreordained the conclusion reached by the Ninth Circuit in upholding the jury's right to decide liability in civil rights actions seeking damages:

"Once those officials who have the power to make official policy on a particular issue have been identified [by the district court] it is for the jury to determine whether their decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur." *Id.* at 737 (emphasis added).

*New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (11th Cir. 1996) simply ignores the *Jett* precedent.

The City does not dispute the inherently factual nature of an inverse condemnation claim. Nor could it given that it adduced dozens of exhibits and witnesses at trial relevant to the factual disputes at issue.

The City does not attempt to distinguish the numerous authorities the Ninth Circuit relied upon in affirming the jury's role in determining liability.

The City instead argues that no federal or state case has ever allowed a jury to decide liability in an inverse condemnation case. The City's legal research is a tad selective.

In *Cochran v. City of Charlotte*, 281 S.E.2d 179, 183, 190 (N.C. App. 1981), *cert. denied*, 288 S.E.2d 380 (1982), a jury decided inverse condemnation liability for airplane overflights. Likewise, in *QC Corp. v. Maryland Port Admin.*, 510

A.2d 1101 (Md. App. 1986), a jury decided inverse condemnation liability. The Maryland Supreme Court reversed the verdict for insufficient evidence, but did not disturb the principle that the jury was empowered to decide liability. *Maryland Port Admin. v. QC Corp.*, 529 A.2d 829 (Md. 1987).

The City also ignores that the inverse condemnation case in which this Court clarified the ripeness test arose from a *jury verdict* under Tennessee law. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 182-183 (1985).

If the City's arguments were adopted, federal district courts would be governed by state law, and a civil rights plaintiff would receive jury trial in some states and not others. This result would undermine the national uniformity of the civil rights act.

The City also fails to explain why the reasonableness of governmental conduct regarding land should be tried to the court but questions of reasonableness in cases such as police conduct are entitled to trial by jury. See *Chew v. Gates*, 27 F.3d 1432, 1443 (9th Cir. 1994).

In *Lynch v. Household Finance Corporation*, 405 U.S. 538, 552 (1972), this Court categorically denied any distinction between property rights and the personal liberty interests:

" . . . [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right,

whether the 'property' in question be a welfare check, a home, or a savings account. In fact a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other."

In *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), an *en banc* panel of the Ninth Circuit affirmed the district court's denial of summary judgment on an equal protection civil rights claim brought by property owners:

"Of course, a jury might reject the plaintiffs' claim that the defendants were motivated by a desire to deflate the value of the plaintiffs' buildings, purchase them, and replace them with a shopping center. However, if proven at trial, the facts alleged by the plaintiffs are sufficient to support a claim of a violation of the equal protection clause." *Id.* at 1327 (emphasis added).

In *Del Monte Dunes I*, the Ninth Circuit ruled that Del Monte Dunes' similar claims were sufficient to establish liability if proven. *Id.* at 1508.

Del Monte Dunes proved at trial, just as the *Armendariz* plaintiffs alleged, that the City denied the development proposal in order to acquire the property. The City advances no principled reason why an equal protection claim premised on this theory should go to the jury, but not inverse condemnation claim based on the identical governmental conduct should not.

The reasonableness of the City's actions were properly decided by the jury.



### III. THIS NINTH CIRCUIT PROPERLY APPLIED SUPREME COURT TAKINGS STANDARDS IN AFFIRMING THE VERDICT

The City concedes that the jury verdict was based upon a proper legal instruction defining the elements of inverse condemnation liability.

The jury was instructed that liability could only be found where the City's decision did not "substantially advance [a] legitimate public purpose" and that the City's decision would substantially advance a legitimate public purpose "if the action bears a reasonable relationship to that objective." *Del Monte Dunes II* at 1429. As the Ninth Circuit framed the issue it was reviewing: "The legitimate purposes - a legal determination - were defined in the instructions. The jurors were left with a reasonableness determination: was the denial reasonably related." *Id.*

The opinion then catalogues the abundant evidence supporting the jury's verdict that the City's actions were unreasonable. *Id.* at 1430-1432. The City does not contest the adequacy of this evidence.

The Ninth Circuit's affirmance of the jury verdict under the instructed standard does not create a new inverse condemnation test.

The Ninth Circuit's discussion of *Dolan* arose in the context of the nexus between the City's actions and its claimed public purposes. This nexus requirement is not peculiar to cases involving dedications. Denials of development that have no nexus to legitimate public purposes by definition do not "substantially advance" those purposes. The jury so found.

As the Ninth Circuit found, *Dolan* did not "disapprove this [traditional] test but, for Fifth Amendment purposes, proposed 'rough proportionality' as an adequate term." *Id.* at 1429. Thus *Dolan* did not create a new takings test. The test remains one of reasonableness, and "Del Monte provided evidence sufficient to rebut each of [the City's] reasons" for denial. *Id.* at 1431.

Moreover, the City conveniently overlooks the fact that this case involved excessive dedications for public use. Del Monte Dunes was required to dedicate the western one-third of the property as a public beach, to construct and maintain a public parking lot thereon, and provide a road through the development for access thereto. The City further required dedication of a public viewshed over the eastern one-third of the property. These dedications, when combined with the City's ultimate refusal to allow development on the remainder of the property, rendered the property unusable and unmarketable.

Thus the City's argument that *Dolan* should not apply because it is limited to dedications is factually wrong as well as legally incorrect. The City's required dedications of Del Monte Dunes' property were the basis for finding that the property was rendered undevelopable and unusable. Thus the Ninth Circuit's discussion of *Dolan* was appropriate, although not necessary to affirm the verdict.

#### IV. CONCLUSION

The jury in this action evaluated the evidence under the identical standards that this Court has created in its takings jurisprudence. Those standards are not challenged by the City. For the reasons given above, Del Monte Dunes requests the Court to deny the Petition for Writ of Certiorari.

Dated: February 25, 1998.

Respectfully submitted,

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No. 97-1235

Supreme Court, U. S.  
**F I L E D**  
**SEP 24 1998**

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In The  
**Supreme Court of the United States**  
October Term, 1997

CITY OF MONTEREY,

*Petitioner,*

v.

DEL MONTE DUNES AT MONTEREY, LTD., et al.,  
*Respondents.*

On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

BRIEF OF THE CITY AND COUNTY  
OF SAN FRANCISCO AS AMICUS CURIAE  
SUPPORTING PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF INTEREST OF AMICUS CURIAE

Under Supreme Court Rule 37.4, amicus curiae City and County of San Francisco, joined by the 84 California cities and counties identified below ("the cities"), submit this brief in support of the petition for a writ of certiorari by the City of Monterey.<sup>1</sup> This case involves the traditional right of a regulatory government agency to a trial by the court, rather than by a jury, to determine the agency's liability for a taking under the Fifth Amendment to the U.S. Constitution. The Ninth Circuit Court of Appeals held that a jury may decide the liability of a city for a taking. Each of the cities is within the jurisdiction of the Ninth Circuit, and is therefore subject to that court's decision in this case. Because the availability of a jury in inverse condemnation cases could have large implications

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<sup>1</sup> The following California public entities join in this brief: the cities of Alameda, Albany, Bakersfield, Berkeley, Bradbury, Burbank, Capitola, Carson, Chula Vista, Claremont, Clayton, Colma, Corte Madera, Cotati, Del Rey Oaks, Dinuba, El Cajon, El Centro, Escondido, Eureka, Fortuna, Garden Grove, Glendale, Huron, Imperial Beach, Lafayette, Laguna Beach, Long Beach, Los Altos, Los Angeles, Madera, Marina, Merced, Montclair, Montebello, Morgan Hill, Novato, Oceanside, Ontario, Orange Cove, Palm Desert, Pico Rivera, Piedmont, Pleasant Hill, Poway, Redding, Rialto, Roseville, Ross, Sacramento, San Anselmo, San Bruno, San Buenaventura, San Diego, San Juan Capistrano, San Luis Obispo, San Mateo, San Pablo, San Rafael, Santa Clara, Santa Maria, Santa Rosa, Sunnyvale, Thousand Oaks, Tiburon, Trinidad, Truckee, Tulare, Vacaville, Vista, Walnut, Wasco, and Yreka; the counties of Butte, Contra Costa, Glenn, Lake, Napa, Riverside, San Diego, Santa Barbara, Santa Cruz, Tulare, and Tuolumne.



for local governments, this Court should consider the cities' viewpoint in this brief.

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## INTRODUCTION

In *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, for the first time, the Ninth Circuit held that a plaintiff is entitled to a jury trial in inverse condemnation cases. In so holding, the Ninth Circuit misconstrued the controlling precedent of this Court.

In *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 245 (1897), this Court held that there is no right to a jury trial for cases under the Takings Clause of the Fifth Amendment. At the time of this Court's decision, the application of the Takings Clause was limited to eminent domain, namely, the government's physical appropriation of land, also known as direct condemnation. Since that time, however, the application of the Takings Clause has been expanded to inverse condemnation, namely, property owners' suits from indirect takings resulting from government regulation of land use. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 122 n. 25 (1978).

This Court has made clear that both direct and inverse condemnation actions arise under the Takings Clause of the Fifth Amendment. *Jacobs v. United States*, 290 U.S. 13, 16 (1933). Thus, the same rules regarding the right to a jury trial apply to both. Review by this Court is necessary to correct the Ninth Circuit's deviation from this Court's precedent in this important area of the law.

Review by this Court is also necessary because the Ninth Circuit's novel conclusion that an aggrieved property owner is entitled to a jury trial in an inverse condemnation proceeding directly conflicts with the only other circuit court decision addressing this issue. In *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (11th Cir. 1996), cert. denied, \_\_\_ U.S. \_\_\_, 117 S.Ct. 2514, 138 L.Ed.2d 1016 (1997), the Eleventh Circuit correctly decided that a property owner is not entitled to a jury to determine liability for inverse condemnation. This Court should grant certiorari to resolve the conflict between the circuit courts.

The petition for certiorari should be granted.

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## STATEMENT OF THE CASE

The property at issue consists of approximately 37 acres overlooking the Pacific Ocean in the City of Monterey, California (City). Beginning in 1981, the owner of the property, Ponderosa Homes, made several unsuccessful attempts to develop the property with houses.

While Ponderosa's last application to build 190 homes was pending with the City, respondent Del Monte Dunes at Monterey, Ltd. and Monterey-Del Monte Dunes Corporation (Del Monte) purchased the property and pursued the application. In 1986, the City denied Del Monte's application.

Del Monte brought an action in the district court against the City for inverse condemnation, violations of its due process and equal protection rights, estoppel, and unjust enrichment. The district court held that Del

Monte's constitutional claims were not ripe for review and dismissed. The Ninth Circuit reversed, finding that the constitutional claims were ripe for adjudication. *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1506 (9th Cir. 1990).

On remand, over the objection of the City, the district court ordered the inverse condemnation and equal protection claims tried by a jury. The district court instructed the jury that it could find the City liable for inverse condemnation if there was no "reasonable relationship" between the City's denial of Del Monte's project and a legitimate public purpose. After a trial, the jury found that the City was liable to Del Monte for inverse condemnation and for a violation of Del Monte's equal protection rights. The jury awarded Del Monte \$1,450,000 in damages.<sup>2</sup> The Ninth Circuit affirmed. *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *reh'g granted*, 118 F.3d 660, 661 (9th Cir. 1997), *reaff'd on reh'g*, \_\_\_ F.3d \_\_\_ (9th Cir. 1997), *Apper. to Petition for Writ of Certiorari* (App.).

#### REASONS FOR GRANTING THE WRIT OF CERTIORARI

In its petition for a writ of certiorari, the City of Monterey states two reasons for granting the petition:

<sup>2</sup> Amici cities and counties do not dispute that once liability for inverse condemnation has been established, the question of damages should be tried to a jury. See *New Port Largo*, 95 F.3d at 1092; *Mid Gulf, Inc. v. Bishop*, 792 F. Supp. 1205, 1215 (D. Kan. 1992); *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 771 F. Supp. 911, 913 (N.D. Ill. 1991).

1) the Ninth Circuit erred in allowing a jury trial on the City's liability for inverse condemnation; and 2) the Ninth Circuit improperly instructed the jury on the standard of review of the City's decision to deny Del Monte's project. Because the resolution of the second issue is unnecessary to the ultimate result in this case, San Francisco and amici cities and counties request review on the first ground only. If this Court reverses the Ninth Circuit's decision on the ground that a jury is not permitted to adjudicate liability for inverse condemnation, the Court would remand the case for a court trial.

#### I. REVIEW BY THIS COURT IS NECESSARY BECAUSE THE NINTH CIRCUIT MIS- CONSTRUED CONTROLLING PRECEDENT OF THIS COURT ON AN IMPORTANT QUESTION OF FEDERAL LAW.

Rule 10 of the Supreme Court provides that review on a writ of certiorari is appropriate when "a United States court of appeals has decided an important question of federal law . . . in a way in conflict with applicable decisions" of the Supreme Court. See *Foucha v. Louisiana*, 504 U.S. 71, 75 (1992) ("Because the case presents an important issue and was decided by the court below in a manner arguably at odds with prior decisions of this Court, we granted certiorari."); *United States v. Doe*, 465 U.S. 506, 610 (1984) ("We granted certiorari to resolve the apparent conflict between the Court of Appeals' holding and the reasoning underlying this Court's holding in *Fisher*"). By allowing Del Monte's inverse condemnation claim to be tried before a jury, the Ninth Circuit misconstrued controlling precedent of this Court.



**A. There Is No Right To A Jury In Cases Arising Under the Takings Clause.**

Inverse condemnation cases arise directly out of the self-executing character of the Takings Clause of the Fifth Amendment. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315-17 (1987), citing *United States v. Clarke*, 445 U.S. 253, 257 (1980). Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *United States v. Clarke*, 445 U.S. at 257. Inverse condemnation differs from direct condemnation (eminent domain) only insofar as the action is initiated by the property owner. See *First English*, 482 U.S. at 315-17; *Agins v. City Tiburon*, 447 U.S. 255, 258 n. 2 (1980). This Court long ago acknowledged that direct and inverse condemnation stem from the same basic right: "The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment." *Jacobs v. United States*, 290 U.S. at 16.

The right to a jury trial for claims under the U.S. Constitution is determined by the Seventh Amendment. The Seventh Amendment provides: "In suits at common law, . . . the right of trial by jury shall be preserved." The Ninth Circuit determined that because an inverse condemnation action is a suit "at common law," *Del Monte*

was entitled to a jury under the Seventh Amendment. But this Court has held that the Seventh Amendment merely "preserves" the right to a jury for actions for which a right to jury trial existed in 1791 when the Seventh Amendment was ratified. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, —, 116 S.Ct. 1384, 1389, 134 L.Ed.2d 577 (1996); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 40-42 (1989); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 459-60 (1977).

When this Court first applied the Takings Clause to the States, the Court confirmed that no right to a jury trial existed for condemnation in 1791:

[B]efore the establishment of the government of the United States[,] it had been the practice in this country and in England to ascertain by commissioners, special tribunals and other like agencies, the compensation to be made to owners of private property taken for public use, and it was not to be supposed that the general provisions in American constitutions, national and state, preserving the right of trial by jury, superseded that practice. [citation omitted.]

*Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. at 245; see also *Atlas Roofing Co.*, 430 U.S. at 458; *United States v. Reynolds*, 397 U.S. 14, 18 (1970) ("[I]t has long been settled that there is no constitutional right to a jury in eminent domain proceedings."), citing *Bauman v. Ross*, 167 U.S. 548, 593 (1897) (estimate of just compensation for property taken under right of eminent domain is not required to be made by a jury) and 5 *Moore's Fed'l Prac.*, @ 38.32(1) at 239 (2d ed. 1969) (practical and jurisprudential history both before and after 1791 lead to conclusion that there is no constitutional right to jury trial in federal courts for condemnation

actions); 8 *Moore's Fed'l Prac.*, @ 38.33(4)(a) at 125 (3d ed. 1997) (no right to jury trial existed for takings in 1791).

Accordingly, because inverse condemnation actions are premised on the Takings Clause, and there is no right to a jury in direct condemnation actions, inverse condemnation actions also do not invoke the right to a jury trial. See *New Port Largo, Inc.*, 95 F.3d at 1092; c.f. *Department of Agri. & Consum. Svcs. v. Bonanno*, 568 So.2d 24, 28 (Fla. 1990) (no right to jury trial for inverse condemnation under Florida Constitution because no right to jury trial for condemnation at common law). The Eleventh Circuit adopted this view: "We have discovered no indication that the rule in regulatory takings cases differs from the general eminent domain framework, in which issues pertaining to whether a taking has occurred are for the court, while damages issues are the province of the jury." *New Port Largo, Inc. v. Monroe County*, 95 F.3d at 1092.<sup>5</sup>

To find a right to a jury in an inverse condemnation case, the Ninth Circuit attempted to distinguish the rule in direct condemnation cases. Without authority, the Court reasoned that direct condemnation proceedings are not tried before a jury because the United States traditionally is a party. App. 8 (citing commentary and case

<sup>5</sup> The only other federal courts to address the issue of the right to trial by jury in an inverse condemnation case agreed with the Eleventh Circuit. See *Mid Gulf, Inc. v. Bishop*, 792 F. Supp. at 1216 (liability for inverse condemnation raises question of law to be determined by the court); *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 771 F. Supp. at 913 (liability for inverse condemnation presented question for the court).

law relating to Federal government's waiver of sovereign immunity to jury trial for inverse condemnation). But as shown above, the rule precluding a jury in condemnation actions is rooted in the consistent practice of our country before adoption of the Seventh Amendment. See *Chicago, B. & Q. R. Co.*, 166 U.S. at 245; *Atlas Roofing Co.*, 430 U.S. at 458; *United States v. Reynolds*, 397 U.S. at 18; *Bauman v. Ross*, 167 U.S. at 593; 8 *Moore's Fed'l Prac.*, @ 38.33(4)(a) at 125.

The Ninth Circuit found a right to a jury on the liability issue because Del Monte's inverse condemnation claim raised mixed questions of fact and law, and Del Monte sought a damages remedy. App. 11-15. The former reason is not relevant to the jury issue; direct condemnation cases also raise mixed questions of law and fact. See, e.g., *United States v. 21.54 Acres of Land*, 491 F.2d 301, 306-07 (4th Cir. 1973). Yet, as demonstrated above, the unanimous and long-standing rule of this Court precludes juries in direct condemnation cases under the Fifth Amendment. As the Supreme Court stated in *Atlas Roofing Co.*: "The point is that the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases." 430 U.S. at 460. The latter reason also is not relevant to whether the liability issue should be decided by a jury; courts have consistently treated liability for inverse condemnation differently from damages.<sup>6</sup>

<sup>6</sup> If a court finds that the government is liable for inverse condemnation, a jury determines just compensation. See *infra* p. 2 and footnote 2.



The Ninth Circuit also found a right to a jury because inverse condemnation actions are actions "at law" rather than suits "in equity." App. 7-9. This logic fails. Direct condemnation also is a right at law; it is not a right in equity, nor a creature of statute. *Atlas Roofing Co.*, 30 U.S. at 458, citing *Kohl v. United States*, 91 U.S. 367, 375-76 (1876) (Judiciary Act of 1789 conferred upon circuit courts jurisdiction over condemnation actions). Yet, direct condemnation claims have never included a right to jury trial. *Id.*

#### **B. Section 1983 Does Not Create A Right To A Jury.**

The Ninth Circuit erroneously assumed that a plaintiff in an inverse condemnation action is entitled to a jury trial because an inverse condemnation action against a local government agency is brought under 42 U.S.C. Section 1983. App. 7-10. The Ninth Circuit's reliance on Section 1983 is misplaced.

Whether a jury is available in an action brought under Section 1983 turns on whether a jury is available for infringement of the underlying constitutional right. See *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (citing *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) and *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (Section 1983 purely a remedy for violation of other federal rights; Section 1983 not a source of substantive rights); see also *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1979) (Civil Rights Act of 1871 provides merely a remedy, not any substantive rights); but see *Cook v. Cox*, 357 F. Supp. 120, 123-25 (E.D. Va. 1973) (Section 1983 creates separate federal right that implicates right to jury trial).

As demonstrated above, there is no constitutional right to a jury in a takings case. Section 1983 does not create such a right.<sup>7</sup>

The Ninth Circuit relied on *Lorillard v. Pons*, 434 U.S. 575 (1978), for the proposition that Section 1983 confers a right to a jury. However, in *Lorillard*, the underlying right the plaintiff sought to enforce originated with the Age Discrimination in Employment Act of 1967 (ADEA). This Court found that in creating a new legal right under the ADEA, Congress intended to incorporate the right to a jury trial that existed for enforcement of similar federal statutes as of 1967. 434 U.S. at 581, 584. Thus, it is wholly consistent with the Seventh Amendment to allow a jury in an action for violation of a right created by Congress after 1791.

The Ninth Circuit rule would also produce anomalous results. A property owner cannot sue a state under Section 1983. *Arizonans for Official English v. Arizona*, \_\_\_ U.S. \_\_\_, 117 S.Ct. 1055, 1069, 137 L.Ed.2d 170 (1997); *Quern v. Jordan*, 440 U.S. 332, 338-41 (1979). Actions for inverse condemnation against a state government are brought directly under the Fifth Amendment. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1006 (1992). Accordingly, under the Ninth Circuit rule, a property owner would have a constitutional right to a jury in an inverse condemnation case in federal court against a

<sup>7</sup> The predecessor statute to Section 1983 was enacted in 1871. At the time of its enactment, there was no right to a jury trial for condemnation actions because there was no right to a jury trial for such actions in 1791. See *infra* pp. 7-8. The mere enactment of Section 1983 did not create the right to a jury trial for claims for which no such right existed in 1871.

local public entity, see *Monell v. Dept. of Soc. Svcs.*, 436 U.S. 658, 690 (1978), but not against a state entity.

The Ninth Circuit also misconstrued a takings action as a type of common-law tort, such as trespass. The Ninth Circuit relied on *Beatty v. United States*, 203 F. 620, 626 (4th Cir. 1913), writ of error dismissed and cert. denied, 232 U.S. 463 (1914) (appeal denied because order not final) for the proposition that inverse condemnation is similar to trespass. However, the Fourth Circuit overruled *Beatty* by implication in *United States v. 21.54 Acres of Land*, 491 F.2d at 306-07 (trial judge had jurisdiction to find facts relative to takings claim) and *Atlantic Seaboard Corp. v. Van Sterkenburg*, 318 F.2d 455, 459 (4th Cir. 1963) ("there is no absolute right to a jury trial on the issue of just compensation in condemnation cases.").

An inverse condemnation claim is not analogous to common-law torts like trespass. In cases of trespass and other common-law torts, the plaintiff sues the defendant for damages for a wrong committed by the defendant. In contrast, under the Takings Clause, the taking is not considered a wrong or an injury as long as the government pays compensation. See *Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 194 (1985). The framers intended the Takings Clause only to apportion the burdens of public projects between the individual and the public as a whole. *Agins v. City of Tiburon*, 447 U.S. at 260 (taking is determination that public at large rather than single owner must bear burden of state's action); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (Takings Clause "designed to bar Government from forcing some people alone to bear public burdens"), *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945) (Takings Clause redistributes economic losses inflicted by

public improvements so they fall upon public rather than those happening to lie in path of project).

## II. REVIEW BY THIS COURT IS NECESSARY TO SECURE UNIFORMITY OF DECISION AMONG THE CIRCUIT COURTS.

Rule 10 of the Supreme Court provides that review on a writ of certiorari is also appropriate when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." According to one commentator: "One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions on [questions of federal law] among the federal courts of appeals. Hence a square and irreconcilable conflict . . . ordinarily should be enough to secure review." Stern, *et al.*, *Supreme Court Practice*, 169 (7th Ed. 1993) (emphasis in original); see, e.g., *United States v. Burke*, 504 U.S. 229, 233 (1992) ("We granted certiorari to resolve a conflict among the Courts of Appeals concerning the exclusion of Title VII backpay awards from gross income"); *United States v. Lorenzetti*, 467 U.S. 167, 173 (1984) (certiorari granted to review Third Circuit opinion that recognized that its interpretation of a statute was "squarely inconsistent" with Sixth Circuit's); *McElroy v. United States*, 455 U.S. 642, 643 (1982) (certiorari granted because of "a conflict among the Circuits on this issue of statutory construction").

The decision of the Ninth Circuit conflicts directly with a decision of another circuit court. App. 7-15. In *New Port Largo*, a landowner sued the county for inverse condemnation, alleging that the county's rezoning of the



property from residential to airport use constituted a regulatory taking under the Fifth Amendment. The trial court rejected the landowner's claim that a jury should decide "subsidiary facts" raised by the takings claim. The Eleventh Circuit affirmed, holding that "no jury had to be empaneled for the regulatory takings claim." 95 F.3d at 1092.<sup>8</sup>

This Court should not defer resolution of the conflict. For two reasons, the only means to effectively resolve the conflict is by immediate review by this Court. First, both circuit courts stated their holdings in unequivocal, unqualified terms. Accordingly, there is no room for modification of either position in future decisions.<sup>9</sup> Second, because the right to a jury trial is controlled by the Seventh Amendment and historical fact, there is no prospect for a legislative resolution of this conflict.

In addition, unless the Court grants review, the conflict will undoubtedly cause confusion in the circuits that have not addressed this jury issue. If circuits adopt the

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<sup>8</sup> The Eleventh Circuit's position is consistent with the rule prevailing in the great majority of the 50 states. *See, e.g., Hensler v. City of Glendale*, 8 Cal.4th 1, 15 (1994). Accordingly, the Ninth Circuit rule would promote forum shopping between the federal and state courts.

<sup>9</sup> The opinion in *New Port Largo* was filed on September 25, 1996, 12 days after the filing of *Del Monte Dunes*. On August 6, 1997, the Ninth Circuit heard oral argument on rehearing in *Del Monte Dunes*. (Appendix 47 incorrectly states the date of oral argument as August 6, 1996.) On October 28, 1997, the Ninth Circuit filed its Order declining to amend its opinion and rejected rehearing *en banc*. The Ninth Circuit's failure to distinguish or to reconcile its decision with *New Port Largo* demonstrates that the two decisions cannot be reconciled.

Ninth Circuit rule, cases tried to a jury before resolution of the issue by this Court may require retrial. The interests of justice and judicial economy require a prompt and definitive resolution.

---

### CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: February 24, 1998

Respectfully submitted,

LOUISE H. RENNE

City Attorney

City and County of

San Francisco

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Chief Deputy City Attorney

ELLEN FORMAN

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Deputy City Attorneys

By ANDREW W. SCHWARTZ

Attorneys for Amicus Curiae

City and County of San Francisco

\*Counsel of Record

4

No. 97-1235

FILED

JUN 4 1996

In The

Supreme Court of the United States

October Term, 1997

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

CITY OF MONTEREY,

*Petitioner,*

v.

DEL MONTE DUNES AT MONTEREY, LTD. AND  
MONTEREY-DEL MONTE DUNES CORPORATION,

*Respondents.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed January 26, 1998  
Certiorari Granted March 30, 1998

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## RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)Del Monte Dunes, et al v. Monterey, City of  
Case No. 86-CV-5042

9/1/87	44	FIRST AMENDED COMPLAINT [1-1] by plaintiff Del Monte Dunes, plaintiff Monterey-Del Monte; jury demand (ti) [Entry date 03/08/91]
12/21/93	105	ORDER by Judge Charles A. Legge re trial procedures (Date Entered: 12/23/93) (cc: all counsel) [3:86-cv-05042] (tmn) [Entry date 12/23/93]
3/4/94	141	JUDGMENT: by Judge Charles A. Legge for plaintiffs in the amount of \$1,450,000.00 and costs; terminating case; appeal filing ddl 4/8/94 (Date Entered: 3/9/94) (cc: all counsel) [3:86-cv-05042] (tmn) [Entry date 03/09/94]

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUITDel Monte Dunes, et al v. City of Monterey  
Docket No. 94-16248

11/15/94	Filed original and 15 copies City of Monterey in 94-16248, City of Monterey in 94-16313 first brief on cross-appeal, (Informal: n) of 35 pages and 2 excerpts of record; served on 11/14/94 [94-16248, 94-16313] (tm) [94-16248 94-16313]
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4/21/95 Filed original and 15 copies Del Monte Dunes' second brief on cross-appeal (Informal: n) of 37 pages; served on 4/17/95 [94-16248, 94-16313] (tm) [94-16248 94-16313]

4/28/95 Filed original and 15 copies City of Monterey in 94-16248, City of Monterey in 94-16313 third brief on cross-appeal (Informal: n) of 26 pages and 5 copies 1 excerpts of record; (minor defcy: excerpts need tan covers); served on 4/28/95 [94-16248, 94-16313] (tm) [94-16248 94-16313]

9/13/96 FILED OPINION: AFFIRMED (terminated on the Merits after Oral Hearing; Affirmed; Written; Signed, Published. J.C. WALLACE, author; Edward LEAVY; Lourdes G. Baird.) FILED AND ENTERED JUDGMENT. [94-16248, 94-16313] (dl) [94-16248 94-16313]

10/4/96 [3095711] Filed original and 40 copies Appellant City of Monterey in 94-16248, Appellee City of Monterey in 94-16313 petition for rehearing with suggestion for rehearing en banc 15 p. pages, served on 10/4/96 PANEL AND ACTIVE JUDGES [94-16248, 94-16313] (em) [94]-16248 94-16313]

6/26/97 Filed order FOR PUBLICATION (J.C. WALLACE, Edward LEAVY, Lourdes G. Baird,): The petition for rehearing is GRANTED. No further briefing is required. The parties shall be prepared to argue, for no more than 20 minutes per side, the following issue: Whether the jury, rather than the judge, can

decide if the City of Monterey's actions substantially advanced a public purpose. (see part IIIB. of our opinion.) Arguments shall be held in San Francisco on 8/6/97, at 10:00am. The parties shall direct any further questions to the clerk of the court. [94-16248, 94-16313] (hh) [94-16248 94-16313]

10/28/97

Filed order FOR PUBLICATION (J.C. WALLACE, Edward LEAVY, Lourdes G. Baird,): The panel reheard argument in this case on 8/6/97. The panel has voted not to amend its opinion. The panel has unanimously recommended that the suggestion for rehearing en banc be rejected . . . The opinion in this case will not be amended, and the suggestion for rehearing en banc is REJECTED. [94-16248, 94-16313] (hh) [94-16248 94-16313]

---



UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

CITY OF MONTEREY

[LOGO]

CITY HALL, MONTEREY, CALIFORNIA 93940

June 13, 1984

Mr. Melvin Nutter  
Chairman  
California Coastal Commission  
631 Howard Street  
San Francisco, CA 94105

Dear Chairman Nutter:

The last time the City's Del Monte Beach LCP was considered, approximately three months ago, we discussed the two primary unresolved issues between the City and the Commission. These are the appropriate means of access to the Phillips Petroleum property, and appropriate designation for the 22 lots on the seaward side of the undeveloped portion of Del Monte Beach Subdivision.

Approximately a week ago the City received a 48-page letter and attachment from the Coastal Commission staff, dealing with these two issues.

Despite the conscientious effort of both City and Coastal Commission staff, there is not as yet an agreement on these two matters.

Perhaps what you are essentially saying is that you have a genuine concern for the two geographical areas under discussion, and you wish to see them treated as appropriate under the California Coastal Conservation Act of 1976. On this point, we completely agree; I wish to assure you that we have an equal affection for this land and for its proper utilization.

Based on the observation that prolonged discussion of the many issues involved probably would not produce agreement, at least within the time allocated for this purpose. I would like to suggest two common sense alternatives for your consideration.

First, we would ask that you approve the Del Monte Beach LCP as reviewed by and approved by the City of Monterey. I assure you that we conducted many long public hearings, that the issues were thoroughly discussed, and that we approached this task most deliberately and conscientiously. Our one-page attachment explains our position on the two matters.

Secondly, if you choose not to do this, then we request that you direct your staff to work conscientiously with the State Department of Parks and Recreation and the California Coastal Conservancy to the end that these properties be purchased by appropriate State Agencies, as the only appropriate means to achieve significant State objectives and to treat the property owners in a fair way. This is by no means a new idea, as it was the earlier plan of the State to do this, a plan endorsed by the City of Monterey. The recent passage of Proposition 18 and the State's current financial condition would allow this to be done if all parties were committed to this common objective.

What we are essentially saying is that the issues involved are too important to be subjected to differences between public agencies. If the use of the land, for bona fide reasons, is to be so severely constricted and if the land is to remain encumbered of development for the enjoyment

and benefit of all Californians, then let us say so and act accordingly, and expeditiously.

If that is your objective, and your decision, then we will be happy and enthusiastic about joining with you in this effort, and ending a battle over contrived issues which is the result of not facing the fundamental issue. If the public is to use and benefit from the use of this land, then there is a method prescribed in the State Constitution for doing this; it is to purchase the land and to compensate the property owners fairly.

On behalf of the Council and citizens of the City of Monterey, I would respectfully ask that the Commission select one of the above alternatives.

Sincerely,

/s/ Clyde W. Roberson  
Clyde W. Roberson  
Mayor

gm

Attach.

Attached letter sent to the following:

Governor George Deukmejian  
Senator Henry Mello  
Assemblyman Sam Farr  
Assemblyman Eric Seastrand  
Assemblyman Rusty Areias  
Mr. William Briner, Director of Parks & Recreation, State of California  
Mr. Samuel Woods, Chairman, California Coastal Conservancy  
Mr. Michael Fischer, Executive Director, California Coastal Commission

Mr. Joseph Petrillo, Executive Director, California Coastal Conservancy  
Monterey City Council  
Press and Media

### ATTACHMENT

June 14, 1984

#### DEL MONTE BEACH LOCAL COASTAL PLAN

##### Access to Phillips Petroleum Property

The primary thrust of Coastal Commission staff report is that primary access to this site should not be from Del Monte Avenue until a complete and thorough access plan for the entire site has been completed and analyzed. The City of Monterey has had an unusual opportunity of reviewing a specific proposal on the Phillips Petroleum site for the last three years. As part of our review of this proposal there has been an environmental impact report done which included a detailed traffic analysis. In addition there have been numerous meetings with the Del Monte Beach Neighborhood, the City of Monterey Police and Fire Departments, the Planning Commission and City Council. The outcome of all these meetings is that the access to this site has been completely analyzed and it has been determined that the most appropriate *primary* access to this site is via Del Monte Avenue with an *emergency* access along Tide Avenue.

##### Development of Vacant Lots

The staff report to you indicates that development of single family dwellings on the 22 seaward lots west of Beach Way would preclude access and recreational uses



of areas subject to potential prescriptive rights and suggests alternatives to this development. Unfortunately, most of these alternative proposals simply do not take into account the fact that these lots are individually owned, and there are eleven different owners of the twenty-two seaward lots. Also the staff report to you does not take into account that the City of Monterey has already evaluated the alternative schemes proposed by your staff - cluster development, transfer of development rights, etc. with no success. The City made a considerable effort to get the property owners together on a cluster development proposal. The City approves the concept, but the City and the Coastal Conservancy were not able to achieve this program. As part of any proposed development in this area, we are not only requiring that Tide Avenue be extended which will enhance the public accessibility to the beach, but we are also requiring that additional parking spaces be included for the general public in this area, prior to the development of the unimproved lots.

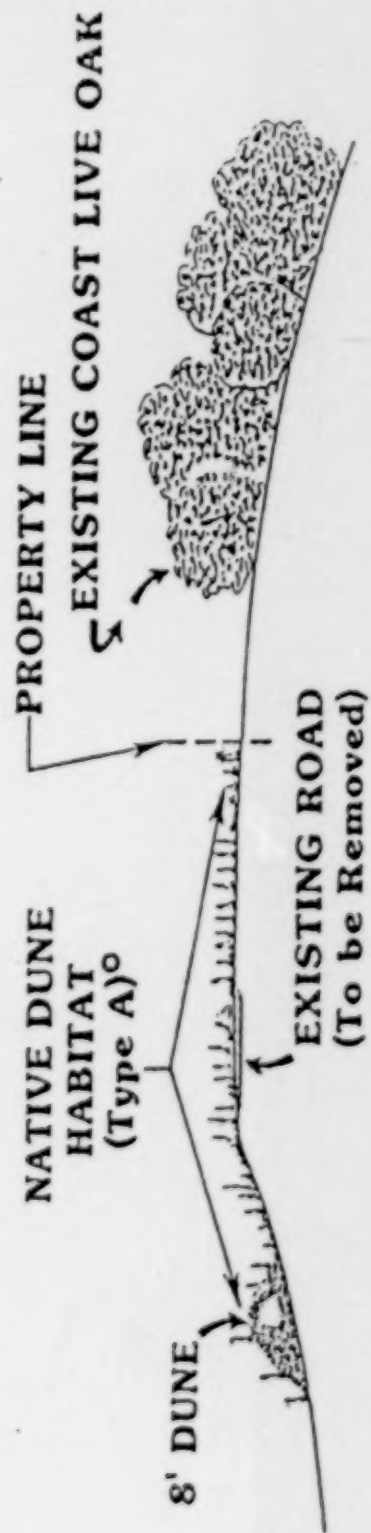
In summary, our position is that we have fully studied the alternative access routes and the alternative development concepts fully and they are simply not viable. We would urge your [sic] to adopt the plans as submitted by the City of Monterey.

---

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

**RESTORATION PLAN**  
**PHILLIPS PETROLEUM SITE**

**MONTEREY, CA**



ML 000413

BRIGHT & ASSOCIATES



RESTORATION PLAN FOR THE  
PHILLIPS PETROLEUM SITE,  
DEL MONTE BEACH, MONTEREY, CALIFORNIA

Prepared for:

Ponderosa Homes  
2635 N. First Street  
San Jose, California 95134

Prepared by:

Bright & Associates  
1200 N. Jefferson, Suite B  
Anaheim, California 92807

July, 1984

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## DUNE RESTORATION PLAN

1. INTRODUCTION

Ponderosa Homes is proposing to construct a residential development on property located in the Del Monte Beach area of Monterey, California (see Figure 1). The site is bounded on the north by the ocean, on the east by state property administered by the State Department of Parks and Recreation, on the south by private property and the Southern Pacific Railroad spur parallel to Del Monte Avenue, and on the west by the Del Monte Dunes neighborhood. The site historically was used as a petroleum tank farm. Some buildings, storage/processing tanks, oiled tank pads, paved roads, pipeline right-of-ways, etc., still exist.

The site, 37.6 acres in total, contains a disturbed Coastal Strand habitat, i.e., a mixture of native and disturbed sand dune and non-native species. The disturbed nature of the site is due to past petroleum activities,

construction of Highway 1, planting of ice plant as ground cover, use of the site as an off-road vehicle area, unauthorized dumping of various kinds of debris, etc. The greatest impact on the dune habitat historically was the introduction of the two species of ice plant to stabilize the dune while the petroleum activities were being conducted. These two species now occupy about 25% of the entire site. Most recently, the greatest impact has been from off-road vehicles.

II. GOALS OF THE RESTORATION PLAN

The most important goal of this dune Restoration Plan is to achieve effective restoration, enhancement and maintenance of about 10.0 acres of the Phillips Petroleum site, e.g., removal of the remaining petroleum facilities, phased removal of the ice plant, creation of new dunes and stabilization of certain existing dunes, and addition of dune species in appropriate portions of the restored area.

The general goals of the plan are as follows:

- A. Reduce the potential for uncontrolled sand erosion on certain portions of the Phillips site.
- B. Enhance portions of the site to achieve native-like conditions.
- C. Replace or restore dune areas lost or damaged by development of the project.
- D. Provide potential habitat areas for the Smith's Blue Butterfly, *Euphilotes enoptes smithi*.

- E. Develop short-term and long-term maintenance plans to assure that the restoration activities maintain reasonable vitality.
- F. Eliminate exotic plants, e.g., ice plant, which tend to out compete and destroy native vegetation.
- G. Coordinate restoration efforts with the ongoing restoration plan established after construction of the wastewater interceptor line which traverses the project site.
- H. Provide a restoration program which achieves the goals of the City of Monterey and the Del Monte Beach Local Coastal Plan.

### III. EXISTING SITE CONDITIONS

The project site presently is vacant, but it has been historically altered by three major events: petroleum activities, construction of Highway 1, and, most recently, by construction of the wastewater interceptor line which traverses the site. The dune area over the interceptor line has been altered by the addition of "new" 15' high dunes, jute matting, snow fencing, irrigation, hydromulching and revegetation activities. In addition to the three major events, there has been extensive damage to the dunes habitat associated with uncontrolled off-road vehicle activities.

Vegetation on the 37.6 acre project site consists mostly of prostrate and succulent groundcover which acts to stabilize the dynamic sand dune environment. Most of the site, about 25%, is covered with sea-fig,

*Mesembryanthemum chilense*, and hottentot-fig, *Mesembryanthemum edule*. Both of these species of "ice-plant" are african plants, i.e., non-native, and they are very hardy, competitive plants. They have, because of a high percent cover of the sand, stabilized most of the project site. They also have displaced some of the less competitive native dune species. There appears to be a continual flux in the abundance of this plant on the site, i.e., it dies back in some areas, and increases in other areas. However, in general, this plant very slowly is occupying a greater percentage of the Phillips site. We estimate that the increase per year, on the average, is about 0.005%.

The native vegetation includes coast live oak (*Quercus agrifolia*), buckwheat (*Eriogonum latifolium*), silver beach weed (*Ambrosia chamissonis*), several species of lupins (*Lupinus* sp.), dune grass (*Poa douglasii*), deerweed (*Lotus scoparis*), and heather goldenbush (*Haplopappus ericoides*). A row of mature, non-native eucalyptus trees are located near the back dune area in the southwestern portion of the site. The coast live-oaks primarily are located along the back, protected portion of the dune and they aid in stabilizing that portion of the dune. See Table 1 for a more complete list of plant species identified on the Phillips Petroleum site and Figure 2 for the general distribution of plants on the site.

The buckwheat plant, *Eriogonum latifolium*, occurs in patches on several portions of the project site. It is estimated, from field reconnaissance and interpretation of recent aerial photographs that it now occurs on about 0.5% of the site (1.88 acres). There have been changes in recent years in the number of individual plants of this species on the site. Arnold estimated that there were 65



plants in 1982, Turner estimated that there were about 250 plants in 1983, and our count in 1984 indicated over 1,000 plants. The increase in the number of plants indicates two things: first, there is recruitment, i.e., addition of new plants, and second, certain of the plants are maturing. The plants presently on the site demonstrate varying [sic] degrees of maturity and survival. Based on random checking of plants during field reconnaissance in June and July, 1984, about 38-40% of the plants are mature; mature indicating a plant of about 0.4 to 0.65 meter (about 16-26") in height, with at least 8 petioles of 3-4 decimeters (about 12-16") in height, and with the inflorescence (flowerhead) about 20-30 millimeters (around 1") in width. In spite of the increase in the number of plants, the general distribution (occurrence over the site) of *Eriogonum latifolium* has not increased since 1981, i.e., it is found on only 0.5% of the site.

There is another buckwheat, *Eriogonum parvifolium*, characteristically found in the adjacent sand dunes to the northeast. However, during our field reconnaissance since 1981, we have not found this species on the Phillips Petroleum site. Arnold (1982) found some individual plants of this species along the embankment next to the railroad tracks, Del Monte Boulevard, and California Highway 1. We believe that these plants were on the property immediately adjacent to the Phillips site.

There are several species of animals commonly found on the Phillips site, namely: western fence lizard (*Sceloporus occidentalis*), alligator lizard (*Gerrhonotus multicarinatus*), tree swallow (*Iridoprocne canadensis*), white crowned sparrow (*Zonotrichia leucophrys*), purple finch

(*Carpodacus purpureus*), and a variety of insects, e.g., ants, beetles, flies, etc.

Extensive studies have been completed on the occurrence of the Smith's Blue Butterfly (*Euphilotes enoptes smithi*). Arnold (1983) conducted extensive research on the ecology of this butterfly, particularly at two sites on the Fort Ord Army Reservation located about 2.0 miles east of the Phillips site. Arnold noted that this species is widely distributed as scattered, isolated populations occurring from the Rocky Mountains to the West Coast. Populations are associated with their larval foodplant *Eriogonum*, typically in habitats with sand dunes or rocky hillsides, at elevations ranging from sea level to 3,350 meters. Populations of the Smith's Blue Butterfly confined to Coastal Monterey County, occur in various dune and canyon habitats. There are six dune habitats in the Coastal Monterey area, i.e., mouth of the Salinas River, Marina Beach dunes, Fort Ord, Seaside Dunes, Monterey Dunes (Phillips site), and Point Lobos State Reserve. Arnold considers the Seaside Dunes as almost extirpated, and the Monterey Dunes as largely decimated.

No eggs, larvae or adult Smith's Blue Butterflies were found on the Phillips site during our late-June to mid-July field reconnaissance during 1981, 1982, and 1983; further, none were found through July 12, 1984. Arnold (1982) did find eight eggs and 42 larvae after examining 130 flowerheads of *Eriogonum parvifolium* located along the railroad track near Highway 1 (Note, that above it is stated that we believe that this species of buckwheat was found on the property immediately adjacent to the Phillips petroleum site). Thus, prior to July, 1984 we found no evidence of any life stage of the butterfly on the

Phillips site. However, on July 12, 1984 we found three larvae: One was found west of the midline of the property, and two were found near the eastern margin of the property (see Figure 2 for the locations). The occurrence of these three larvae in 1984 as contrasted with the years 1981 through 1983, most likely is associated with the increased maturity of the *Eriogonum latifolium* plants on the Phillips site.

Arnold (1983) estimates that the Monterey Dunes (Phillips site) habitat comprises about 1% of the Smith's Blue Butterfly total habitat in the Monterey Coastal area. Further, Arnold notes that the successful existence of this species is based on having adequate available, usable space. Recent research has indicated that as the breeding area for butterflies decreases, there is an adverse impact on the survival rate and lifespan of the butterflies. This implies that for patchy habitats, i.e., habitats that are discontinuous geographically and variable in size from small to smaller, species will reach a level where the survival rate will be very low and where the possibility of extinction is very high. This habitat influence is particularly significant for the Smith's Blue butterfly since the potential for colonization is very low to nonexistent. Unless the habitat on the Phillips site is increased in size and unless the habitat achieves a greater level of viability, the possibility of the Smith's Blue Butterfly actively and successfully using the Phillips site is deemed to be very low. Since the butterfly has not used the site in recent years prior to 1984, it indicates that the habitat has not been suitable. Further, the limited distribution of the food plant on the site (0.5%), even if the majority of the plants

were mature, precludes the site ever supporting a large population of butterflies unless the site is restored.

#### IV. ACCESS TO THE PHILLIPS SITE

There are three options for access to the Phillips site: via Tide Avenue on the western margin of the site, through the state property on the eastern margin of the site, and via Del Monte Avenue on the southern margin of the site. Considering only the present biotic nature of the Phillips site, the potential impacts of developing about 19.5 acres of the site (see Figure 1), and the feasibility of a successful restoration plan, the access via Del Monte Avenue represents the best option. It should be noted that two access points to the proposed Ponderosa Homes development will be required, a main access and a separate emergency access. The reasons that the Del Monte access represents the best option are:

- A. Access via Tide Avenue would require a road extending to the west across the middle of the Phillips site. This road would enter the proposed project and continue westward to allow development of a suitable public parking area. Since the area around the public parking already has been modified, i.e., in some places with 15' high dunes, it will be necessary to provide a wind-break along the seaward margin of the road to keep the moving sand from covering the road. This situation would be very comparable to that near Palm Springs, California, where Caltrans has planted a living wind-break of Tamarisk trees. Adding a wind-break on the Phillips site



would yield very negative impacts on the dune areas, i.e., it would alter sand movement, alter the succession of dune plant species, etc.

- B. Access via the State property would require a longer entry road across the dune areas, both for entrance to the project and to the public parking area, and thus a greater length of wind-break would be required. The location of the wind-break would generate negative impacts on the dynamics of the dune to a greater extent than the Tide Avenue option since it would impact both the Phillips site and the State property.
- C. Access via Del Monte Avenue would require removal of an existing paved road, which varies in width from 16-18', removal of existing buildings and paved parking areas, and loss of two-four coast live oak trees. This access would not alter the dynamics of the dune processes since it would be located on the furthest inland portion of the dune. Further, this access will allow development of some semi-isolated areas, i.e., from human activity, where restoration can be carried out to provide significant new habitat for the Smith's Blue Butterfly.

Based on our biotic evaluation of the site, and the potential for success of the restoration plan described below, we recommend that the main access to the site be via Del Monte Avenue, and that the emergency access be via Tide Avenue provided that the emergency access is constructed in such a way as to preclude unauthorized entry by any type of vehicle.

## V. PROJECT RELATED HABITAT IMPACTS

Residential development is proposed on approximately 19.5 acres of the Phillips site (see Figure 1). This acreage will be used as follows: 4.5 acres for buildings, 4.5 acres for paved streets, and 10.5 acres for landscaping. In addition, there will be about 0.65 to 1.0 acre of paved area for the access road leading from Del Monte Avenue depending upon the final route of the road. About 65% of the access road already is paved, and the resultant impacts will be less than if the road were constructed on an undisturbed dune area. The total developed area will occupy about 20.5 acres, leaving about 17.1 acres undeveloped.

The present habitat of the area to be developed, exclusive of the access road, based on field reconnaissance and interpretation of aerial photographs, is as follows: tank pad sites = 0.70 acres; ice plant coverage = 7.70 acres; areas with hardened oil fragments, remnants of pipelines, etc. = 3.30 acres, and dune habitat (both undisturbed and disturbed) = 7.80 acres. We estimate that 65% of this dune habitat is disturbed.

The proposed development will require removal of the tank pad sites, the ice plant, hardened oil fragments, remnants of pipelines and the 7.80 acres of undisturbed and disturbed dune habitat. Accordingly, there will be a loss of some *Eriogonum latifolium* and other dune plants. Construction of the proposed access road will not result in the loss of any *Eriogonum latifolium*, but it will result in the loss of about two-four coast live oak trees, depending upon the final selection of the access road route, and it also will result in the removal of considerable ice plant.



## VI. RESTORATION PLAN POLICIES AND CONCEPTS

A Restoration Plan is proposed which will restructure, restore or augment existing conditions. The basic components of the plan include: construction of 8' and 15' dunes and the addition of jute matting and snow fencing on the exposed margins of the most seaward dunes; revegetation of areas where existing plant cover consists of non-native species, and addition of dune plant species in restructured and restored areas; and a maintenance program essential for making the restoration plan successful. The plan is presented with two options: Option A which allows for central entry of the access road to the project area and with the public parking located in the middle of the project area, i.e., on the seaward margin; and Option B which allows for entry along the western half of the project site and with the public parking located on the western half of the project area (see Figures 3, 4 and 5).

In order for the restoration plan to be effective several short-term and long-term actions are required, namely:

### A. Prohibition of Off-Road Vehicles

An extremely important aspect of the restoration plan will be to prevent off-road vehicles from driving on any of the dune areas on the site. Such abuse of the dunes will delay/inhibit restoration and preservation activities, disturb the Smith's Blue Butterfly, etc. Therefore, the following policies will be implemented:

- Fencing shall be provided to prevent entry into the dune areas, e.g., where internal

roads dead-end; however, such fences shall not prohibit public access to the adjacent beach area.

- Areas established for public access to the dune areas and the beach shall be fenced to prevent vehicular entry.
- Appropriate signs shall be placed at public access points indicating that the use of off-road vehicles on any portion of the dune area and adjacent beach is prohibited.
- A vehicle barricade shall be placed opposite the extension of Tide Avenue; this barricade must be strong enough to withstand easy removal by a winch on an off-road vehicle but also constructed so as to provide an emergency access acceptable to the City of Monterey Fire and Police Departments.
- Occupants of the proposed project will be informed of the dune restoration program and advised to call enforcement agencies if they see off-road vehicles in the dune areas.

### B. Public Access Trails

Two major public access trails will lead from the public parking areas to the beach. There will be other "natural" trail areas within the dunes between the beach and the public parking area. These will be clearly marked to limit unnecessary foot traffic across restored areas. Further, where the opportunity for developing "new" trails is high, a 4' high snow fence will be added to "direct" traffic along the prescribed paths. A well designed access pathway will be required at the area

opposite Tide Avenue to preclude indiscriminate entry to the restored dune areas.

The following policies will be implemented:

- Public access to the dune areas and the adjacent beach will be focused by locating the public parking at the end of the entrance road to the project area.
- Public access trails will be clearly marked.
- Occupants of the proposed project will be informed of the presence of public parking and related access trails and advised to call enforcement agencies if they see individuals damaging the public facilities or the adjacent restored dune areas.

#### C. Preservation Areas

Certain areas with native dune plants and some areas with restored dune plants shall be considered preservation areas, i.e., areas where public access will be restricted. Plants and animals in these areas will have the opportunity to develop without direct human influences. The largest preservation area will be on the lower portion of the back dune, adjacent to the access road. This area is designed to be generally isolated from human activity (see Figures 3, 4 and 5). The concerns and related policies are as follows:

##### 1. Pre-Construction Activities:

Certain portions of the site will be preserved or only require minor enhancement, such as the area with the eucalyptus trees, the areas with coast

live oaks and portions of the dunes areas along the eastern margin of the project area. Prior to construction, where no development or only minor enhancement will occur, such areas shall be temporarily fenced to prevent accidental trampling, accidental damage by vehicles/heavy equipment, etc. All construction workers will be informed about these areas and why they are fenced. The fences will remain in place until construction activities are completed.

##### 2. Post-Construction Activities:

Following construction activities, preservation areas shall be permanently secured from trampling by a "living fence", e.g., line of coast live oaks, or by a retaining wall or the access road or by a 8'-15' high dune. Well marked walkways will be provided from the main public access point (parking area) to the beach to limit trampling of native dune species.

#### D. Areas Altered by Construction

##### 1. Pre-Construction Activities:

In areas where development is proposed, a landscape architect, biologist or other person knowledgeable about native dune species, shall, immediately prior to grading, be responsible for removing and preserving as many native dune seedling plants and seeds



as possible. The seedlings will be planted in areas not proposed for development and where no dune restoration is required (see Figures 3, 4 and 5), or kept either on or off the site where they will be protected from construction activities, visitors to the beach, etc. All such seedling plants must be handled carefully to help assure their continued vitality. It is anticipated that for certain of the species the mortality rate will be 50-60%.

Seedlings and seeds will be obtained from *Eriogonum*, *Haplopappus*, *Ambrosia*, *Abronia*, *Lupinus*, *Lotus*, etc. Any coast live oaks removed for the construction of the access road will be relocated immediately to the site for the "living fence."

## 2. Post-Construction Activities

The short-term objective is to restore and stabilize the dune areas altered by construction and other human activities. The long-term objective is to add or resculpture dunes, remove non-native species, plant dune species, and protect the restored areas by precluding unnecessary public access and enforcing an effective maintenance program.

As soon as possible, dune restoration/resculpturing shall be commenced. It is very important that re-vegetation of the dunes begin immediately thereafter to minimize the potential for excessive erosion. The time sequence preferred [sic] is as follows: regrade, resculpture or

develop dunes in the summer after the strong spring winds; and begin revegetation or augmentation planting in early fall so that plant vitality will be enhanced by the rainy season.

A temporary irrigation system will be required, in certain areas, such as along the "living fence." Some of the revegetated areas initially will require occasional irrigation to allow the vegetation to become established. After the plants are established, the system can be turned off and used only when damaged, disturbed, etc., areas are replanted as part of the maintenance program.

In areas most susceptible to wind erosion, i.e., those areas planted with Type B vegetation (see section on Plant Types which follows), jute matting will be used to reduce sand movement (see Figures 3, 4 and 5). Snow fencing also will be used for this purpose. Stable, hardy, low-lying dune plants will be placed on the bluff of the dunes, which are subject to the most severe environmental conditions, e.g., dune grass, *Ambrosia*, *Abronia*, etc. More bushy, woody shrubs, e.g., *Eriogonum*, *Lupinus*, *Haplopappus*, etc. will be placed on the more protected portion of the dunes. These plants will provide a reasonably extensive root system and will be important in stabilization of the dune areas. Note, for certain areas, there will be a positive impact from the proposed buildings, i.e., they will help to reduce wind erosion and thus aid in dune area stabilization.



As the dune areas are reconstructed or newly constructed, seedling plants and seeds will be added.

Clearly defined walkways will be provided from the public parking area and from the adjacent residential area to the beach so that trampling across dune areas will be substantially minimized.

#### E. Areas to be Enhanced

The dune areas with ice plant will be reconstructed by removing the ice plant, recontouring (e.g., adding a 8-15' dune, creating a shallow depression of 1-1.5', etc.) and replanting with Type A or Type B vegetation (see Figures 3, 4 and 5 and discussion on Plant Types below). The new plants initially will be observed on a weekly basis to assure their survival, to remove any regrowth of ice plant, etc. Note, that in certain areas adjacent to the access road, the eucalyptus trees and the coast live oak, it initially may be necessary to leave patches of ice plant to provide some dune stabilization until the adjacent plants in the revegetated areas are stabilized. Subsequently, all of the remaining ice plant will be removed.

#### F. Plant Types

The plants found on the site are listed in Table 1. For purposes of the restoration plan, we have evolved two assemblages of plants, i.e., Type A and Type B. Type A plants will be used in the hinddune and more protected locations and Type B plants will be used on the foredune and the topdune areas.

#### Type A Plants:

*Baccharis pilularis*  
*Eriogonum latifolium*  
*Eriogonum parvifolium*  
*Haplopappus ericoides*

*Lotus Scoparis*  
*Lupinus arboreus*

Coyote Bush  
 Buckwheat  
 Buckwheat  
 Heather  
 Goldenbush  
 Deerweed  
 Bush Lupine

#### Type B Plants:

##### Foredune Areas:

*Abronia latifolia*  
*Ambrosia chamissonis*  
*Artemisia dracunculus*

Sand Verbena  
 Sand Verbena  
 Tarragon

##### Topdune Areas:

*Abronia latifolia*  
*Abronia umbellata*  
*Poa douglasii*

Sand Verbena  
 Sand Verbena  
 Dune Grass

#### G. Plant Handling

A plan for sequential removal and immediate replanting of Type A and Type B plants will be developed with the general contractor. Such a plan will require careful handling of all seedling plants, cuttings and seeds.

The seedling plants removed from the site will be immediately planted. Cuttings taken from the plants will be propagated on-site or at an adjacent nursery area. New seedling plants will be generated from the seeds collected on the site or at immediately adjacent sites.

In certain areas hydromulching will be needed. Seeds to be sowed will include those from *Abronia latifolia*,

*Eriogonum latifolium* and *parvifolium*, *Haplopappus ericoides* and *Poa douglasii*.

As the new dune/existing dune areas become available, the Type A and Type B plants will be added in the areas to be enhanced or restored (see Figures 3, 4 and 5).

On a priority basis, the area to be replanted with Type A plants located between the "living fence" and the access road/eucalyptus trees, should be developed as soon as possible. Preferably, this area should be prepared for revegetation prior to any site improvements in the 19.5 acre project area. That way, plants in the project area can be relocated, cuttings taken, etc., before site improvements begin. It is believed that this area will be the most suited for use by the Smith's Blue Butterfly.

## VII. MAINTENANCE PROGRAM

The restoration plan must include a short- and a long-term maintenance program. The short-term program will involve a site walk-through by a landscape architect or the equivalent on about a biweekly basis for at least 18 months after the initial restoration/enhancement activities begin. If the construction of the project takes longer than 18 months, the biweekly visits should extend at least nine months beyond the date of final construction. During the biweekly visits the dune areas will be examined and the following maintenance actions taken:

- A. Dead or dying replanted Type A or Type B vegetation will be removed and replaced as soon as possible.
- B. Areas of sand blow-out, or vegetation trampling will be noted and repaired/replaced.

- C. Snow fencing and jute matting will be checked and repaired/moved as needed.
- D. Any reoccurrence of ice plant will be noted and all such ice plant removed, and, if feasible, the area replanted with native dune species.

The long-term maintenance program will involve a site reconnaissance on about a quarterly basis to assess blow-outs, trampling, wind damage, damage to public walkways and related signs, etc. Repairs and replanting should be made as soon as feasible and considering seasonal influences. Effectiveness of the long-range maintenance plan will depend upon a responsible entity being assigned the responsibility for accomplishing the maintenance in a prudent and efficient manner.

TABLE 1  
AMBIENT VEGETATION

SCIENTIFIC NAME	COMMON NAME	NATIVE OR INTRODUCED
<i>Abronia umbellata</i>	Sand verbena	N
<i>Ambrosia chamissonis</i>	Silver beach weed	N
<i>Ambrosia</i> sp.		N
<i>Ammophilum arenaria</i>	European beach grass	I
<i>Artemisia douglasiana</i>	Mugwort	N
<i>Artemisia dracunculus</i>	Tarragon	N
<i>Artemisia pinocephala</i>	Beach sagewort	N
<i>Baccharis pilularis</i>	Coyote bush	N
<i>Castilleja latifolia</i> *	Monterey paint- brush	N

\* Listed as rare but not endangered by California Native Plant Society (CNPS)



<i>Conium maculatum</i>	Poison Hemlock	N
<i>Convolvulus soldanella</i>	Beach morning glory	N
<i>Croton californicus</i>		N
<i>Dudleya caespitosa</i>	Live-forever	N
<i>Eucalyptus</i> sp.	Eucalyptus	I
<i>Eriogonum latifolium</i>	Buckwheat	N
<i>Franseria chamissonis</i>	Beach burr	N
<i>bipinnatisecta</i>		
<i>Haplopappus ericoides</i>	Heather golden-bush	N
<i>Heterotheca grandiflora</i>	Telegraph weed	N
<i>Lotus scoparis</i>	Deerweed	N
<i>Lupinus arboreus</i>	Bush lupin	N
<i>Lupinus chamissonis</i>	Lupin	N
<i>Lupinus</i> sp.	Lupin	N
<i>Mesembryanthemum chilense</i>	Sea-fig	I
<i>Mesembryanthemum crystallinum</i>	Ice plant	I
<i>Mesembryanthemum edule</i>	Hottentot-fig	I
<i>Oenothera cheiranthifolia</i>	Beach primrose	N
var. <i>cheiranthifolia</i>		
<i>Oenothera cheiranthifolia</i>	Beach primrose	N
var. <i>nitida</i> **		
<i>Phacelia</i> sp.		N
<i>Poa douglasii</i>	Dune Grass	N
<i>Polygonum paronychia</i>	Beach knotweed	N
<i>Pteridium aquilinum</i>	Bracken Fern	N
<i>Quercus agrifolia</i>	Coast live oak	N
<i>Rhamnus purshiana</i>		N
<i>Rubus ursinus</i>	California Blackberry	N
<i>Solanum nodiflorum</i>		I
<i>Solanum umbelliferum</i>	Nightshade	N
<i>Tetragonia expansa</i>	New Zealand Spinach	I

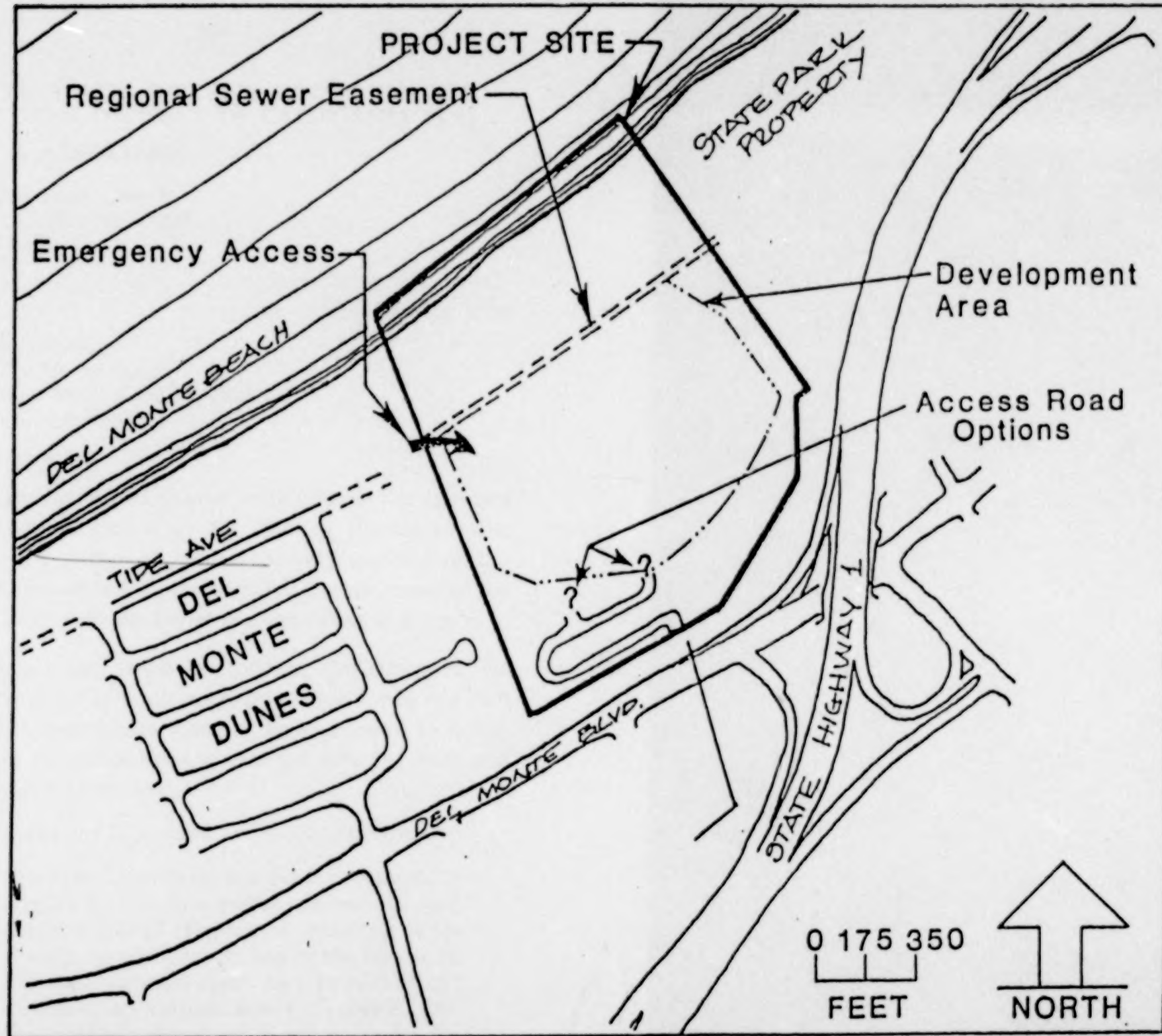
\*\* Listed as rare by Abrams but not CNPS

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**VICINITY MAP**

**FIGURE 1**

BRIGHT & ASSOCIATES

**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.E.)**

**BRIGHT & ASSOCIATES**

1200 N. Jefferson Unit B  
Anaheim, California 92807  
(714) 632-8521

July 25, 1984

Mr. Ralph Swanson  
Fish & Wildlife Service  
2800 Cottage Way, Room E-1823  
Sacramento, CA 95825

Dear Mr. Swanson:

We have continued to meet with a variety of agencies regarding development of the Phillips Petroleum site, Monterey, CA. Although no one has yet signed-off on the proposed habitat restoration plan for the site, most of the agencies have indicated that the approach is correct.

Based on our latest analysis of the situation, we believe that the following are germane for use by the Fish and Wildlife Service to make a determination in accordance with the procedures associated with the Rare and Endangered Species Act:

1. There are 37.6 acres within the Phillips site.
2. The site historically has been substantially altered by use as a petroleum storage site, construction of Highway 1, planting of ice plant as ground cover, use of the site as an off-road vehicle area, and unauthorized dumping of various kinds of debris. Off-road vehicle problems continue to be the most destructive force.



3. Project development will occupy, including the access road, about 20.5 acres, i.e., 17 acres will be undeveloped.
4. Within the area to be developed, the present habitat, based on field reconnaissance and interpretation of aerial photographs, is as follows: tank pad sites = 0.70 acres, ice plant coverage - 7.70 acres, areas with hardened oil, pipelines, roads, etc. - 3.30 acres and dune habitat (undisturbed and disturbed) = 7.80 acres. About 65% or about 5 acres of the dune habitat is disturbed.
5. The two species of ice plant now cover about 25% of the entire site and we estimate that the increase in coverage, on the average, is about 0.005% per year.
6. *Eriogonum latifolium* (buckwheat), food source of the Smith's Blue Butterfly is found on the site; coverage is about 0.05% of the site; the percent coverage has not increased since 1981, although there has been an increase in the maturity of the plants since 1981 (we estimate that 38-40% of the plants were mature in 1984). The distribution of this species on the site is very patchy, i.e., generally in small isolated areas.
7. No eggs, larvae or adult Smith's Blue Butterflies were found on the Phillips site during the years 1981-1983. Three pupae were found during July, 1984. Also, during July, 1984, six eggs were found after examination of 166 *Eriogonum latifolium* flowers.
8. The patchy distribution of the *Eriogonum latifolium*, the highly disturbed nature of

- the Phillips site, the continuing opportunity for off-road vehicle damage, the continuing increase in coverage of the site by ice plant, the genetic limitations of the Smith's Blue Butterfly re migration, reduced habitat genetic pressure, etc., all indicate that the Phillips site, without restoration, will not sustain a significant population of Smith's Blue Butterflies. There is a detailed analysis of the genetic problems in Arnold's 1983 paper published in University of California, Entomology, 99: 1-161, and in a 1975 paper by Diamond published in Biological Conservation, 7: 129-146.
9. Habitat restoration is proposed on 10-12.75 acres. This restoration will include restructuring existing dunes, adding new dunes, adding dune vegetation including two species of *Eriogonum*, relocating coast live oak trees, etc. The restoration is planned so that there will be continuity between the restored areas and this will facilitate use by the Smith's Blue Butterfly.
  10. The Restoration Plan includes requirements for both short-term and long-term maintenance. The long-term maintenance requirement is very critical, i.e., most restoration efforts cease after the initial changes have been accomplished and there are no means for assuring the continued success of the restoration efforts.
  11. Based on the work of Arnold, Cooper, Powell, etc. (See references in Restoration Plan for specific citations), the current distribution of the Smith's Blue Butterfly is very patchy. Much of the patchy character, i.e.,

isolated nature, is associated with a series of man-made changes. Therefore, since there is no opportunity to remove the man-made changes, it is appropriate to establish restoration-maintenance efforts within each of the isolated areas. This concept already is being implemented by the California Department of Fish and Game at the mouth of the Salinas river.

12. The Phillips site is adjacent to a piece of property owned by the State of California and administered by the California Department of Parks and Recreation. There is a small triangular area within that property which contains disturbed and undisturbed dune habitat (see the attached photograph). That area will be added to the restoration plan for the Phillips site.

The above is a brief review of the salient points regarding the Phillips site, and the Restoration Plan previously provided contains additional details.

We do not believe that this situation is similar to that in the San Bruno Mountains, i.e., the habitat is highly disturbed, the habitat size is very small, and the use of the habitat by the Smith's Blue Butterfly presently is very low and there is little anticipation that the use of the habitat will increase significantly without the aid of a restoration program. Accordingly, we believe that it should be possible to evolve, in a relatively short time frame a program of review which will satisfy the concerns of the City of Monterey, California Department of Fish and Game, California Department of Parks and Recreation, California Coastal Commission and the Fish and Wildlife Service (FWS). We have discussed the present

FWS process with Ray Arnett, Assistant Secretary Fish & Wildlife and Parks, Department of the Interior, and his staff, and with certain of the staff at FWS Headquarters, Washington, D.C. and it appears that it is possible to proceed [sic] with considerable dispatch to develop a suitable restoration plan, and in turn, obtain an appropriate FWS permit. We urgently request that such an expedited procedure be established.

We will be meeting with the General Planning staff of the California Department of Parks and Recreation on Wednesday, August 1, 1984 to work out the details for adding the small triangle of state property to the Phillips site Restoration Plan. We anticipate that we can have the details ready for your review by August 8, 1984

We will be before the City of Monterey Planning Commission on August 14, 1984 for consideration of the Tentative Tract Map and the related approvals. The City and the Coastal Commission have asked that we proceed as quickly as possible to obtain an answer to the following question:

Is the present dune habitat on the Phillips site such that the appropriate plan of action is to develop a restoration plan?

We are prepared to work closely with you, to provide additional general and technical information, meet with any and all individuals you deem appropriate, so that we can have a general or definitive answer for the City by the August 14, 1984 meeting.

As a suggestion, the following steps/process might be the most efficient:



1. Work with the FWS staff to assemble all the necessary general and technical data.
2. Schedule a meeting with FWS, Coastal Commission, Fish and Game, etc., staff to discuss the situation, review technical and procedural requirements and establish a procedure for timely completion of review of the proposed development and restoration efforts for the Phillips site.
3. Completion by FWS of a preliminary determination on the dune habitat characteristics [sic].
4. Complete the Restoration Plan for the entire habitat area, i.e., Phillips site and the adjacent state property.
5. Review of Restoration Plan by FWS
6. FWS decision re Restoration Plan adequacy re requirements of Rare and Endangered Species Act, etc.

I am sorry that I was unable to attend the meeting with Mr. Varga last Friday. We look forward to your earliest response to this letter. Please call myself or Debra at (714) 632-8521 if was can provide additional details or to establish a schedule for the necessary meetings to work out any problems regarding the project.

Sincerely,

BRIGHT & ASSOCIATES

Original signed by

Donald B. Bright

DBB:vc

Attachments

cc: Bill Wojtkowski, City of Monterey  
 Haywood Norton, City of Monterey  
 Ed Brown, Coastal Commission  
 Joy Chace, Coastal Commission  
 Bruce Elliott, Fish & Game  
 Dick Felty, Parks & Recreation  
 Gunther Boccia, Ponderosa Homes  
 Paul Davis, Davis et al.

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

[LOGO]

United States Department of the Interior

FISH AND WILDLIFE SERVICE

SACRAMENTO ENDANGERED SPECIES OFFICE

2800 Cottage Way, Room E-1823

Sacramento, California 95825

AUG 22 1984

Mr. Bill Fell, Planning Services Manager  
City of Monterey  
City Hall  
Monterey, CA 93940

Subject: Restoration Plan for the Phillips Petroleum Site,  
Monterey, California

Dear Mr. Fell:

This is in response to your letter of August 6, 1984 to Mr. Richard J. Navarre regarding the Restoration Plan for the Phillip Petroleum Site in the Del Monte Dunes area of the City of Monterey.

Ponderosa Homes is proposing to construct a residential development on the 37.6 acre Phillips Petroleum Site. The proposed residential development will utilize approximately 19.5 acres of the Phillips Petroleum Site as follows: 4.5 acres for buildings, 4.5 acres for paved streets and 10.5 acres for landscaping. An additional acre of land may be required for a paved access road leading to Del Monte Avenue.

The Dune Restoration Plan associated with the proposed Ponderosa Homes development, dated July, 1984 was prepared by Bright and Associates. The stated goal of the plan is to achieve effective restoration, enhancement and

maintenance of about 10.0 acres of the Phillips Petroleum Site.

Vegetation on the now vacant 37.6 acre site is primarily iceplant. The Restoration Plan indicates that two species of iceplant cover about 25 percent of the site and that the native vegetation includes coast live oak, *Quercus agrifolia*; buckwheat, *Eriogonum latifolium*; silver beach weed, *Ambrosia chamissonis*, several species of lupine, *lupinus* spp.; dune grass, *Poa douglasii*; deerweed, *Lotus scoparius*; and heather golden bush, *Haplopappus ericoides*.

Developments within the coastal sand dunes such as that proposed by Ponderosa Homes represents a permanent loss of dune habitat and would preclude restoration of the entire 37.6 acre site. However, we believe restoration, enhancement and maintenance of 10 of these acres could ameliorate on site adverse impacts to the endangered Smith's blue butterfly, *Euphilotes enoptes smithi* that will result from the development. The fact that the numbers of *Eriogonum latifolium*, the food plant of the Smith's blue butterfly have been increasing is evidence that dune restoration is occurring naturally because this plant requires a dynamic sand dune environment to become established.

In regard to the general goals listed on pages 2 and 3 of the restoration plan, we support those that eliminate the exotic ice plants and those that provide potential habitat areas for the Smith's blue butterfly. We do not necessarily agree with the plans to achieve the goals, especially those involving the removal and replacement of sand and those that control the natural movement of sand. We can also support the plan to prohibit off-road vehicles in the area to protect the Smith's blue butterfly and its food plant.

Plans relating to relocating plants such as *Eriogonum* spp. have little likelihood for success.

Plant types and assemblages of plants to be used as described on pages 11 and 12 seem rather limited when compared to the number of species listed in Table 1. However, only plants native to the site should be used. *Rubus ursinus*, which is not native to the area, should not be used.

We note on page 5, that on July 12, 1984, Smith's blue butterfly were found on the property. Because the Smith's blue butterfly is an endangered species, it is protected by Federal law. Any authorizations by the City, to allow for the Ponderosa Homes development or for the Dune Restoration Plan, that would cause the killing or taking of an endangered animal species are prohibited by the Endangered Species Act of 1973, as amended. We will work with the City and the project proponents to examine this issue if desired.

If you should have any questions regarding this matter, please contact Ralph Swanson of this office.

Sincerely,

/s/ Gail C. Kobetich  
Gail C. Kobetich  
Project Leader

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**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**

**CITY OF MONTEREY**

**To:** Community Development Director

**From:** Planning Services Manager

**Date:** August 29, 1984

**Subject:** Phillips Petroleum Site Restoration Plan

Following a series of calls and correspondence between Bright and Associates, U. S. Fish and Wildlife Services and Dr. Richard Arnold, our consultant, I talked to Dr. Arnold on the phone this morning. Dr. Arnold relayed the results of his meeting last night with Don Bright. He said they discussed Dr. Bright's response to City, Fish and Wildlife Service and Dr. Arnolds [sic] comments. They discussed the problems with Dr. Brights [sic] restoration plan and what could be done to resolve them. Dr. Arnold said that at this time he could not recommend approval of Dr. Brights [sic] restoration plan. He would need to see more particulars about the biological aspects of the plan to conclude that the plan was biological sound [sic].

He had specific comments about Dr. Bright's plan. He said the proposed restoration area, seaward of the regional sewer line was not viable. He said the proposed restoration on the East border of the property was doubtfully viable because of its lineal nature. He felt the habitat in the Eastern portion of the site where the three butterfly larva were found July, 1984 should be preserved if possible. While he felt the new road alignment for the Western portion of the site might reduce the impact on the habitat, he was also concerned about it splitting the habitat. Expanding on that point, he felt that even with a good restoration plan the butterflies on this site would be



isolated from other habitat on other sites within their range, and thus would be vulnerable to extinction. He felt that off-site mitigation measures should be explored. He cited other areas, for example Marina, Ft. Ord, the adjacent State property, and the U. S. Naval Postgraduate School property.

Dr. Arnold was skeptical that restoration efforts within the Ponderosa site bowl area would be successful. With the exception of the back dune area, he was skeptical of the restoration feasibility of the East area and again the North area seaward of the sewer line. Don Bright stated in the beginning of his restoration plan that the plan objective was to "achieve effective restoration, enhancement and maintenance of about 10.0 acres on the Phillips Petroleum site." U. S. Fish and Wildlife in their August 22, 1984 letter said that "we believe restoration, enhancement and maintenance of 10 of these acres could ameliorate on site adverse impact to the endangered Smith's blue butterfly." However, none of the agencies nor biological consultants have presented any evidence that 10.0 acres is a minimally acceptable, satisfactory or superior habitat. U.S. Fish and Wildlife's goal of "effective contiguous habitat" is the only reasoned criteria presented to date. If the project is to meet the goal of restoring, enhancing and maintaining effective contiguous habitat, then at least three alternatives come to mind:

1. The position could be taken that the habitat on the back dune is acceptable providing that the applicant secure Coastal permission and U.S. Fish and Wildlife approval of a final restoration plan for that area.
2. The applicant could be asked to revise his plan by removing structures in the Eastern part of the site to

obtain more effective contiguous habitat along that boundary that would meet the approval of the Coastal Commission and U.S. Fish and Wildlife Service.

3. The position could be taken that the the Coastal Commission and U.S. Fish and Wildlife Service address the plan and be responsible for its final approval.

Under Federal law, the U.S. Fish and Wildlife Service is responsible for preserving endangered species like the Smith's blue butterfly. They are supposed to prepare recovery plans for the habitat range of the endangered species. According to Dr. Arnold U.S. Fish and Wildlife has prepared a recovery plan for the Smith's blue butterfly habitat in this region but it has not been approved. Such a plan would prioritize areas for preservation, areas for maintenance and areas that might have joint use. Lacking such a plan, U.S. Fish and Wildlife is understandably trying to preserve every bit of habitat they possibly can. We do not know at this time what quality and how much habitat the U.S. Fish and Wildlife Service would approve. That may not be known until an application is submitted to them by the project proponents.

/s/ Bill  
Bill Fell

Attachments: August 17, Richard Arnold Letter  
August 22, U.S. Fish & Wildlife Service Letter  
August 29, Donald Bright Letter

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

CITY OF MONTEREY

To: Community Development Director

From: Senior Planner (Norton)

Date: September 4, 1984

Subject: PONDEROSA HOMES PROJECT SCHEME D  
DATED AUGUST 28, 1984 - CONSISTENCY  
WITH DEL MONTE BEACH LAND USE PLAN  
(LUP)

Ponderosa Homes Scheme D adheres to all policies in the Del Monte Beach LUP with one exception. Scheme D shows the private yard areas of some of the seaward units encroaching upon the regional sewer easement. LUP policy requires that development shall be set back of the regional sewer easement (Policy 10b on page 81 in the Del Monte Beach LUP). To be consistent with the LUP, Scheme D should show no private development encroachment into the regional sewer easement.

Paul Davis, the architect [sic] for Ponderosa Homes, has expressed a concern with the City of Monterey's proposed conditions of approval addressing the preservation of significant habitat areas. Paul's concern is with the word "preserve" which he thinks could be interpreted to preclude restoration of significant habitat areas. In reviewing the conditions I do believe that the intent of conditions 3 and 4 would be clearer if the word preserve was replaced by the word protect. However, if it is too much trouble to change the wording at this late hour, perhaps Paul's concern can be addressed by explaining that the Del Monte Beach LUP habitat protection policies allow for restoration and that proposed conditions 3 and 4 state that

preservation efforts shall be undertaken in line with habitat protection policies in the Del Monte Beach LUP. As long as the conditions reference the LUP policies, I believe Paul's concern is addressed.

/s/ HN

Haywood Norton

c: Planning Services Manager (Fell)

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**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)  
CITY OF MONTEREY**

**To:** City Manager

**From:** Community Development Director

**Date:** September 7, 1984

**Subject:** SUPPLEMENTAL INFORMATION REGARD-  
ING APPEAL OF PLANNING COMMISSION  
DENIAL OF SITE PLAN AND PLANNED  
UNIT DEVELOPMENT OF 190-UNIT TOWN-  
HOUSE AND CONDOMINIUM DEVELOP-  
MENT AT 2301 DEL MONTE AVE  
(PONDEROSA HOMES)

Recommendation:

That City Council concur with the Staff recommendation that the proposed plan indicated as "scheme D" be approved subject to the conditions and modifications indicated on Revised Exhibit A.

Discussion:

Since the time the original staff report was written for the September 4, 1984 City Council meeting, staff has received additional information regarding this project. This information was going to be given as part of oral testimony at the September 4, 1984 meeting, but since the matter has been continued it has allowed staff to provide this in written form.

Gale Kobetich of the United States Fish and Wildlife in the Sacramento office has indicated to me that he has reviewed the dune restoration plan prepared by the applicant's consultants, but he needs additional information prior to approval. Furthermore he indicated that it

would be completely appropriate to condition any site plan approval upon further review and acceptance by the U. S. Fish and Wildlife Service.

Attached is a memo from Senior Planner Norton regarding the private yard areas encroaching upon the original sewer easement. This is not in agreement with Del Monte Beach LUP adopted by the City of Monterey, and therefore this area will need to be redesigned. Staff has also had time to evaluate the proposal of replacing the six flats in the Northwestern portion of the site with two townhouse units. Due to changes in elevation this does not seem to be an appropriate approach. Another minor concern is regarding conditions of approval which address the preservation of significant habitat areas and particularly the word "preserve" versus the word "protect".

As a result of the forementioned concerns, staff has suggested modifications to conditions 1, 3 and 4. If you or individual Council members have any concerns regarding these revised conditions, or any aspect of this proposed project, please do not hesitate to contact me prior to the September 13, 1984 Council meeting.

/s/ BW  
Bill Wojtkowski



## CITY OF MONTEREY

To: Community Development Director

From: Senior Planner (Norton)

Date: September 4, 1984

Subject: PONDEROSA HOMES PROJECT SCHEME D  
DATED AUGUST 28, 1984 - CONSISTENCY  
WITH DEL MONTE BEACH LAND USE PLAN  
(LUP)

Ponderosa Homes Scheme D adheres to all policies in the Del Monte Beach LUP with one exception. Scheme D shows the private yard areas of some of the seaward units encroaching upon the regional sewer easement. LUP policy requires that development shall be set back of the regional sewer easement (Policy 10b on page 81 in the Del Monte Beach LUP). To be consistent with the LUP, Scheme D should show no private development encroachment into the regional sewer easement.

Paul Davis, the architect [sic] for Ponderosa Homes, has expressed a concern with the City of Monterey's proposed conditions of approval addressing the preservation of significant habitat areas. Paul's concern is with the word "preserve" which he thinks could be interpreted to preclude restoration of significant habitat areas. In reviewing the conditions I do believe that the intent of conditions 3 and 4 would be clearer if the word preserve was replaced by the word protect. However, if it is too much trouble to change the wording at this late hour, perhaps Paul's concern can be addressed by explaining that the Del Monte Beach LUP habitat protection policies allow for restoration and that proposed conditions 3 and 4 state that

preservation efforts shall be undertaken in line with habitat protection policies in the Del Monte Beach LUP. As long as the conditions reference the LUP policies, I believe Paul's concern is addressed.

/s/ HN

Haywood Norton

c: Planning Services Manager (Fell)

Revised  
EXHIBIT A  
September 7, 1984

PROPOSED CONDITIONS OF APPROVAL FOR PLAN  
UNIT DEVELOPMENT FOR CONDOMINIUM PROJECT  
AT 2301 DEL MONTE AVENUE (PONDEROSA HOME)

1. *SITE PLAN* The approved plans shall be in general accordance with scheme D dated August 30, 1984 on file with the Department Community Development ~~with the exception that the 6 flats numbered 65-70 in the Northwestern portion of the site be replaced with two townhouse units of A-3 or of comparable size; with the exception that there be no private development encroachment into the regional sewer easement. Those lots that presently encroach into the regional sewer easement shall be redesigned subject to ARC review and approval. Particular attention shall be given to the redesign of the two most North-westerly lots (lots 93 and 94) to ensure that the redesign does not impact the emergency access or result in substantial changes to the existing land form.~~
2. *PROCESS* Prior to submittal of the tentative map, the applicant shall submit sufficient detailed plans



for concept review and approval by the Architectural Review Committee. Submittal of the tentative map shall be in substantial compliance with the conceptual [sic] approval of the Architectural Review Committee.

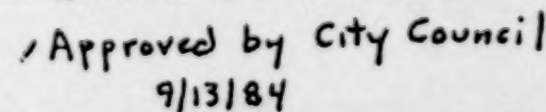
3. **SMITH'S BLUE BUTTERFLY** Prior to final map or any construction, which ever occurs first, the developer shall ~~preserve~~ *protect* the existing habitat, in line with habitat protection policies in the Del Monte Beach Land Use Plan. The habitat preservation shall be reviewed *and approved* by California Department of Fish and Game and U.S. Fish and Wildlife Service and the City of Monterey. Any significant changes to the site plan as a result of that review will require an approval by the City of Monterey and may require resubmittal of tentative map.
4. **RARE AND ENDANGERED PLANTS** All rare and endangered plants shall be ~~preserved~~ *protected* in line with the habitat protection policies in the Del Monte Beach Land Use Plan. The rare and endangered plant preservation program shall be reviewed by the California Native Plant Society, and approved by the City of Monterey.
5. **ACCESS** All vehicular accessways shall be in accordance with the Department of Public Works and the Fire Department. The main street access as well as the parking areas for beach access shall be dedicated to the City of Monterey. Specific designs of the boardwalks for public access shall be reviewed and approved by the Architectural Review Committee.
6. **FENCING** Architectural Review Committee shall evaluate the entire site to determine what portions shall be fenced. The style of materials and location shall be reviewed and approved by the ARC.

7. **GRADING** All grading shall satisfy [sic] the requirements of ~~the~~ Department of Public Works. The natural contour of the land shall be followed as much as possible.
8. **UTILITIES** All utilities shall be underground except as otherwise approved by the Planning Commission.
9. **FIRE DEPARTMENT REQUIREMENTS** Applicant shall comply with the requirements of the Fire Department including but not limited to the provision of an adequate number of fire hydrants, and ~~protection~~ of trash enclosures.
10. **PUBLIC WORKS DEPARTMENT REQUIREMENTS** Applicant shall comply with the requirements of the Public Works ~~Department~~.
11. **HOMEOWNERS ASSOCIATION** The Homeowners Association Agreement ~~shall~~ be reviewed and approved by the City Attorney as an effective and economically feasible means of operating the association. The developers shall secure a letter and report from the lending institution or Office of State Real Estate Commissioner assuring the City that the monthly maintenance fee to be charged the homeowners is sufficient to guarantee an appropriate level of maintenance and operation. It shall be the Homeowners Association responsibility to maintain the public access road clear of sand and to replace any trees which are removed in accordance with the City's ordinance.
12. **SOUNDPROOFING BETWEEN UNITS** Each unit shall be appropriately soundproofed between units to provide privacy for each family. The developer shall conduct an acoustical analysis of the structural design of the residential buildings and incorporate structural mitigations to reduce interior noise as recommended in that analysis.

13. *PARK DEDICATION FEE* Per the recommendation of the Park and Recreation Department no park dedication fee shall be required. However the applicant will be required to dedicate an open space easement to the City of Monterey on the back dune slope (the area facing Del Monte Avenue from the units to the City of Monterey right-of-way). Furthermore the applicant shall be required to dedicate an open space easement to the City of Monterey on the property seaward of the development line as shown on scheme D.
14. *AFFORDABILITY AGREEMENT* Applicant shall comply with Ordinance 2416 and Resolution 82-16, regarding moderate income housing.
15. *EXPIRATION* This Use permit is valid for a period of 18 months, during which time the applicant shall be responsible for obtaining concept approval by the ARC and approval of the tentative map in accordance with condition 2.

\*Revised from earlier report





BEST AVAILABLE COPY



UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

MAYOR:  
Clyde Roberson

COUNCIL MEMBERS:  
Dan Albert  
Theresa Canepa  
Richard Hughett  
Ruth Vreeland

CITY MANAGER:  
John Dunn

MINUTES OF MEETING:

Meeting was called to order by Mayor Roberson  
who led in the Pledge of Allegiance.

PRESENT: COUNCIL MEMBERS: ALBERT, CANEPA, VREELAND,  
ROBERSON

ABSENT: COUNCIL MEMBERS: HUGHETT

STAFF City Manager, City Attorney, City Clerk,  
PRESENT: Assistant City Manager, Parks and Recre-  
ation Director, Public Facilities Director,  
Personnel Director, Police Chief, Community  
Development Director, Fire Chief, Public  
Works Director

Mr. Cimarron Conway withdrew his request to hold  
a Seafare '84 and Arts and Crafts Festival on  
Wharf II.

ROLL CALL  
HUGHETT ABSENT

NEW BUSINESS

Proposal by the Cimarron Group  
to hold a Seafare '84 and  
Columbus Weekend Arts &  
Crafts Festival on Wharf 2  
October 6 and 7, 1984

PUBLIC HEARINGS

Following Staff Presentation, Mayor Roberson opened  
the Public Hearing. Speaking in support of the  
Appeal was Mr. Gunther Boccia of Ponderosa Homes.  
Speaking regarding the proposed Restoration Plan  
for the Phillips Petroleum Site was Dr. Donald  
Bright, of Bright and Associates. Speaking in  
opposition to the appeal were Mr. Ron Bostwick,  
Dei Monte Beach Property Owners Association,  
and Mr. Carl Larson, Sierra Club Monterey County  
Task Force. There being no further speakers,  
the Public Hearing was closed.

Motion of Albert to grant the appeal, approve  
"Scheme D" (document entitled "Ponderosa Homes-  
Area Comparison), subject to the modifications and  
conditions indicated on "Exhibit A" (document en-  
titled "Proposed Conditions of approval for Plan  
Unit Development for Condominium Project at 2301  
Del Monte Avenue-Ponderosa Homes" dated August 30,  
1984) was not seconded.

2301 Del Monte Avenue - Appeal  
of Planning Commission Denial  
of Proposed Site Plan and  
Planned Unit Development for  
190 Unit Townhouse and Condo-  
minium Development (Ponderosa  
Homes)

9/13/84

-1-

Motion of Vreeland to continue the matter to October 16 pending a response from the Fish and Wildlife Service regarding the proposed Restoration Plan for the site was not seconded.

On Motion Vreeland, seconded by Canepa and carried by the following Roll Call vote, it was moved the Appeal be granted, that the Council approve the maximum density of 190 units, that the proposed access routes be approved, and that a response from the Fish and Wildlife Service be obtained prior to the Architectural Review Committee and Planning Commission's final approval of the Tentative Map for the development.

AYES: COUNCIL MEMBERS: CANEPA, VREELAND, ROBERSON  
NOES: COUNCIL MEMBERS: ALBERT  
ABSENT: COUNCIL MEMBERS: HUGHETT

Mayor Roberson asked that his concerns regarding the view corridors, the proposed public parking areas, the restoration plan and a possible 15% reduction in total site coverage be responded with the 15% reduction in overall density of the project be considered throughout the Architectural Review Committee and Planning Commission's review of the development.

On Motion Vreeland, seconded by Canepa and carried by the following Roll Call vote, it was moved the Ordinance Accepting Leasehold Improvements from Gino's Restaurant on Wharf 1 be Passed to Print:

AYES: COUNCIL MEMBERS: ALBERT, CANEPA, VREELAND, ROBERSON

NOES: COUNCIL MEMBERS: NONE

ABSENT: COUNCIL MEMBERS: HUGHETT

On Motion Roberson, seconded by Canepa and carried by the following Roll Call vote, it was moved the Ordinance Adjusting Compensation for Battalion Chiefs Management Association for Fiscal Year 1984-1985 be passed to print:

AYES: COUNCIL MEMBERS: ALBERT, CANEPA, VREELAND, ROBERSON

NOES: COUNCIL MEMBERS: NONE

ABSENT: COUNCIL MEMBERS: HUGHETT

On Motion Vreeland, seconded by Canepa and carried by the following Roll Call vote, it was moved the Council proceed with Greater Technical Orientation and Involvement in the City's Computer Program and that a Study Session be set aside for a presentation.

9/13/84

-2-

RESOLUTION NO. 84-160  
Appeal Granted subject to  
Conditions

59

#### ORDINANCES - FIRST READING

Ordinance Accepting Leasehold Improvements from Gino's Restaurant on Wharf 1

Passed to Print

Ordinance Adjusting Compensation for Battalion Chiefs Management Association for Fiscal Year 1984-1985

Passed to Print

#### UNFINISHED BUSINESS

Possible Designation of City Council Subcommittee relating to City Computer System

**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**

RESOLUTION NO. 84-160 C.S.

RESOLUTION GRANTING APPEAL FROM DENIAL  
OF SITE PLAN; PONDEROSA HOMES CONDO-  
MINIUMS, 2301 DEL MONTE AVENUE

---

WHEREAS, the Planning Commission having previ-  
ously denied the proposed site plan for a 190 unit condo-  
minium project at 2301 Del Monte Avenue, the City  
Council did entertain an appeal therefrom; and

WHEREAS, the City Council does find that the site  
plan as proposed is conceptually satisfactory and is in  
conformance with previous decisions of this Council  
regarding density, number of units, location on the prop-  
erty, and in other respects;

NOW, THEREFORE, BE IT RESOLVED BY THE  
COUNCIL OF THE CITY OF MONTEREY that the deci-  
sion of the Planning Commission denying the site plan  
for this development is hereby overruled, and the site  
plan know as scheme D dated August 30, 1984, is hereby  
approved subject to the conditions of approval attached  
hereto and incorporated by the reference as Exhibit A.

PASSED AND ADOPTED BY THE COUNCIL OF  
THE CITY OF MONTEREY this 13th day of September,  
1984, by the following vote:

AYES: COUNCILMEMBERS: Canepa, Vreeland, Roberson

NOES: COUNCILMEMBERS: Albert

ABSENT: COUNCILMEMBERS: Hughett

---



APPROVED:

/s/ CLYDE ROBERSON  
Mayor of said City

ATTEST:

/s/ P. L. O'HEARN  
PATRICIA L. O'HEARN  
City Clerk thereof

Revised  
EXHIBIT A  
September 13, 1984

CONDITIONS OF APPROVAL FOR PLAN UNIT DEVELOPMENT FOR CONDOMINIUM PROJECT AT 2301 DEL MONTE AVENUE (PONDEROSA HOME)

1. SITE PLAN The approved plans shall be in general accordance with scheme D dated August 30, 1984 on file with the Department of Community Development with the following exceptions:
  - a. There be no private development encroachment into the regional sewer easement. Those lots that presently encroach into the regional sewer easement shall be redesigned subject to review and approval by the Architectural Review Commission. Particular attention shall be given to the redesign of the two most north-westerly lots (Lots 93 and 94) to insure that the design does not impact the emergency access or result in substantial changes to the existing land form.
  - b. The Planning Commission shall evaluate and determine whether additional public parking should be provided. As part of this evaluation the Commission shall consider increasing the existing public parking areas; indicated on

Scheme D providing parking on the North-South public street within the proposed right-of-way or by widening this road; or by changing a portion of the private streets to public streets with on-street parking.

- c. The maximum total floor area (without garages) is 236,760 square feet. The Planning Commission shall review and consider the alternatives of reducing this total floor area to approximately 222,163 square feet, which is a 15% reduction from the total floor area in the 224 unit plan.
  - d. The Planning Commission shall evaluate the alignment of the view corridors in order to increase the view potential.
2. PROCESS Prior to submittal of the tentative map, the developer shall submit sufficient detailed plans for concept review and approval by the Architectural Review Committee. Submittal of the tentative map shall be in substantial compliance with the conceptual approval of the Architectural Review Committee and with any changes resulting from the modifications in Condition 1.
  3. SMITH'S BLUE BUTTERFLY Prior to submittal of the tentative map the developer shall protect the existing habitat [sic], in line with habitat protection policies in the Del Monte Beach Land Use Plan. The habitat preservation shall be reviewed and approved by California Department of Fish and Game and U.S. Fish and Wildlife Service and the City of Monterey. Any significant changes to the site plan as a result of that review will require an approval by the City of Monterey and may require resubmittal of tentative map.
  4. RARE AND ENDANGERED PLANTS All rare and endangered plants shall be protected in line with the

habitat protection policies in the Del Monte Beach Land Use Plan. The rare and endangered plant preservation program shall be reviewed by the California Native Plant Society, and approved by the City of Monterey.

5. ACCESS All vehicular accessways shall be in accordance with the Department of Public Works and the Fire Department. The main street access as well as the parking areas for beach access shall be dedicated to the City of Monterey. Specific designs of the boardwalks for public access shall be reviewed and approved by the Architectural Review Committee.
6. FENCING Architectural Review Committee shall evaluate the entire site to determine what portions shall be fenced. The style of materials and location shall be reviewed and approved by the ARC.
7. GRADING All grading shall satisfy the requirements of the Department of Public Works. The natural contour of the land shall be followed as much as possible.
8. UTILITIES All utilities shall be underground except as otherwise approved by the Planning Commission.
9. FIRE DEPARTMENT REQUIREMENTS Applicant shall comply with the requirements of the Fire Department including but not limited to the provision of an adequate number of fire hydrants, and protection of trash enclosures.
10. PUBLIC WORKS DEPARTMENT REQUIREMENTS Applicant shall comply with the requirements of the Public Works Department.
11. HOMEOWNERS ASSOCIATION The Homeowners Association Agreement shall be reviewed and approved by the City Attorney as an effective and

economically feasible means of operating the association. The developers shall secure a letter and report from the lending institution or Office of State Real Estate Commissioner assuring the City that the monthly maintenance fee to be charged the homeowners is sufficient to guarantee an appropriate level of maintenance and operation. It shall be the Homeowners Association responsibility to maintain the public access road clear of sand and to replace any trees which are removed in accordance with the City's ordinance.

12. SOUNDPROOFING BETWEEN UNITS Each unit shall be appropriately soundproofed between units to provide privacy for each family. The developer shall conduct an acoustical analysis of the structural design of the residential buildings and incorporate structural mitigations to reduce interior noise as recommended in that analysis.
13. PARK DEDICATION FEE Per the recommendation of the Park and Recreation Department no park dedication fee shall be required. However the applicant will be required to dedicate an open space easement to the City of Monterey on the back dune slope (the area facing Del Monte Avenue from the units to the City of Monterey right-of-way). Furthermore the applicant shall be required to dedicate an open space easement to the City of Monterey on the property seaward of the development line as shown on scheme D.
14. AFFORDABILITY AGREEMENT Applicant shall comply with Ordinance 2416 and Resolution 82-16, regarding moderate income housing.



15. EXPIRATION This Use permit is valid for a period of 18 months, during which time the applicant shall be responsible for obtaining concept approval by the ARC and approval of the tentative map in accordance with condition 2.
- 

**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.E.)**

cc: Haywood - pls review

[LOGO]  
United States Department  
of the Interior

Fish and Wildlife  
Service  
Lloyd 500 Building,  
Suite 1692  
500 N.E. Multnomah  
Street  
Portland, Oregon 97232

In Reply Refer To:  
Your Reference:

March 22, 1985

Mr. Virgle Cockrum  
Loan Guaranty Division  
Veterans Administration  
211 Main Street  
San Francisco, California 94105

Subject: Interagency Endangered Species Consultation,  
Home Loan Guarantees, Del Monte Dunes of  
Monterey, Monterey County, California (1-1-85-  
F-15)

Dear Mr. Cockrum:

This Biological Opinion is in response to your December 11, 1984, request for formal consultation pursuant to Section 7 of the Endangered Species Act of 1973, as amended. The proposed action would provide federal home loan guarantees for the purchase of newly built condominiums in the city of Monterey, Monterey County, California. The proposed location, known as the Phillips Petroleum site, is part of the historic Monterey Sand Hills dune system that supports habitat for the endangered Smith's blue butterfly, (Euphilotes enoptes smithi) (SBB).

We have studied the applicant's Environmental Impact Report, dated January 27, 1982, which evaluates a much larger and considerably different housing scheme than presently proposed. A recent report titled *Restoration Plan for the Phillips Petroleum Site, Del Monte Beach, Monterey, California* dated July, 1984, prepared by Bright and Associates outlines a concept for sand dune and native plant restoration including replanting species beneficial to SBB. Our recent draft Recovery Plan for SBB, other published literature, and a considerable volume of correspondence with knowledgeable experts in the field of entomology also assisted us in the preparation of this Biological Opinion. A complete administrative record is on file at our Sacramento Endangered Species Office.

Several meetings between our Service and the applicant's representatives have been held since summer 1984. On June 27, 1984, and February 25, 1985, Service representatives toured the project site to increase our understanding of the proposal and its impacts on endangered species.

#### Biological Opinion

It is our Biological Opinion that approval of federal home loan guarantees is not likely to jeopardize the continued existence of the Smith's blue butterfly.

#### Description of the Proposed Action

The federal government proposes to back home loans for qualifying U.S. military vetrans [sic] for a portion of the 190 condominiums to be built on the Phillips site. Veterans Administration typically guarantees, insures or

privides [sic] direct funding up to a ceiling amount of \$27,500 to allow vetrans [sic] to obtain home loans at a moderate interest rate, a long amortization period, and often without down payment. VA currently has only a conceptual plot plan of the condominium proposal. Extensive additional review within VA will be required, particularly architectural design reviews, prior to final approval of loan guarantees.

Condominiums are proposed on the 37.6 acre former Phillips Petroleum tank storage area at the intersection of Del Monte Avenue and State Highway #1. The site was abandoned in the 1940's and all facilities, save for a few buildings along Del Monte Avenue, removed. Several large oiled tank pads, a remnant perimeter road; and minor debris also remain on the site. The property will be entirely bulldozed to install roads and utilities, and to construct housing on 20.5 acres of the site. The applicant proposes to restore about 10 acres of native sand dune ecosystem and create conditions favorable to SBB primarily along the high back dune facing Del Monte Avenue and, secondarily, along the north edge of the property that abuts the State Parks parcel (Bright and Assco. 1984). Iceplant, which now largely carpets the dunes particularly along Del Monte Avenue, would be removed (in stages) and sand "dunes" would be structured or contoured from existing sand. Assembledges [sic] of native dune plants, including host plants for SBB, would be planted and maintained. The sand dune restoration program is tentatively scheduled to be bonded and started prior to other construction on the property (Bright, pers. comm.). The applicant had initially secured at least tentative



agreement with the California Department of Parks and Recreation to utilize adjacent State Parks property in the restoration scheme. That proposal, however, is no longer viable.

The Phillips Petroleum site is within the Del Monte Beach Land Use Plan area (California Coastal Act) presently in preparation at the City of Monterey. The California Coastal Commission has twice denied certification of the LUP based, in part, on objections to the primary access design for this condominium development and associated environmental impacts (California Coastal Commission 1984).

#### Species Account

Species of *Euphilotes* are widely distributed from the Rocky Mountains (to 3,350 meters) to the Pacific coast, typically inhabiting sand dunes and rocky hillsides in close association with the larval food plant, *Eriogonum* (Arnold 1983). Langston (1975) reports considerable variation in *Eriogonum* host preference, climatic influence, size, color and wing spot pattern.

Mattoni (1954) originally described the subspecies *Euphilotes enoptes smithi* from Burns Creek, Highway #1, Monterey County. The Recovery Plan lists 7 known coastal sand dune and 12 cliff/chapparal localities [sic] for SBB (USFWS 1984). While it was long thought limited to Monterey County coastal sand dunes, Smith's blue butterfly colonies have now been confirmed at some inland sites of ancient beach sands (Zayante Sand Hills, Santa Cruz County) and serpentine grasslands (San Mateo

County). The Recovery Plan currently lists 2 sand parkland and 2 serpentine grassland locations (USFWS 1984). These discoveries extend the recognized distribution of SBB. Furthermore, Emmel and Emmel (1973) have noted "near" *smithi* individuals further south in Santa Barbara and Ventura Counties. Taxonomic studies will probably be required to differentiate these populations correctly. It is likely that additional populations of the species will be found.

Arnold (1983) has contributed most to our understanding of the life history of SBB as a result of his work on coastal dune populations at Ft. Ord, Monterey County, about two miles north of the Phillips site. Variations among, and within, colonies are known, but we believe conclusions drawn from Ft. Ord studies are applicable. The following life history synopsis is largely from from [sic] Arnold's work.

Typically, SBB maintains a close affinity for its sole nectar sources and larval food plants, *Eriogonum latifolium* and *E. parvifolium*. Distribution of the host buckwheats in California is more extensive than that of SBB (USFWS 1984). Females deposit eggs directly on or in the flowering heads of the two *Eriogonum*. Females may select older, larger plants as a strategy to maximize survival (Arnold 1982). Eggs hatch in 4-8 days and larvae begin feeding on the flower parts. By late September larvae crawl to the base of the host plant to pupate in the leaf litter.

Adults emerge in June and July, and as late as mid-September. Arnold has noted that emergence at Ft. Ord sites appears to be closely synchronized with the peak flowering period of the host plant. Females live about 5-9

days while males fly for only 2-7 days. A staggered emergence results in a flight period totalling about 40 days.

The total daily population at Ft. Ord study sites never exceeded 1,065 individual adults during 1977-1979 field work, but densities of 139 females/hectare and 215 males/hectare *Eriogonum* habitat were recorded. Suitable habitat for the SBB often occurs as isolated clusters, but within its habitat the species may be densely distributed.

The adult SBB is totally occupied with nectaring, perching, mating and egg laying. Movement (vagility) and dispersion are limited. At Ft. Ord, SBB females stayed within a mean of 1.3 hectares while the males exhibited even more restricted behavior (0.9 hectares). Only 25% of marked individuals moved more than 70 meters. Females traveled the furthest, a maximum of 226 meters. The longest translocation recorded for males was 144 meters.

Coastal dune habitats are primarily threatened by highway construction, military activities, recreation and urbanization. Planting stabilizing ground cover, especially exotic iceplants (*Mesembryanthemum edule* and *M. chilenses*) reduces natural sand dune dynamics that favor *Eriogonum* presence a vigor (Arnold 1983). Foot traffic, off-road vehicle traffic, and commercial sand mining are also threats to both coastal and inland colonies (USFWS 1984). Sand dune habitats are among the most fragile. More than half the native sand dune acreage in Monterey County has been destroyed (Powell 1978).

Former use of the project site as a petroleum tank farm has resulted in almost complete alteration of the historic

sand dunes. Tank pads cover 0.7 acres, iceplant - 7.7 acres, oil/debris - 3.3 acres, and remnant dunes - 7.8 acres (Bright and Assoc. 1984). *Eriogonum latifolium*, however, is clearly reinvading the site and increasing its numbers and biomass (Arnold 1982, Bright and Assoc. 1984). Presently there are about 1000 individual *E. latifolium* covering 1.88 acres or 5% of the site.

Searches for SBB on the Phillips property have been conducted annually since 1981 (Bright and Assoc. 1984) without success despite Arnold's (1982) collection of SBB adults and larvae from *E. parvifolium* along the railroad tracks on adjoining land, and identifications 1500 feet from the property line at the Laguna del Rey outlet (Yor, pers. comm.). The EIR claimed SBB do not use *E. latifolium* at this site (Earth Metrics 1982). In July 1984, three larvae believed to be SBB, were sighted on *E. latifolium* on the Phillips site. No collections were made but descriptions relayed to knowledgeable entomologists indicate that at least one was *smithi* (Bright, pers. comm.). The other larvae may have been the acmon blue (*Icaricia acmon*), known to be present at other SBB sites (Langston 1975), or other allied blue butterflies (Anon.). Even experienced experts find it difficult to distinguish species at the larval stages (Arnold, pers. comm.). Subsequently, a single SBB adult was observed on the State Parks parcel immediately to the north (Bright 1984).

#### Analysis of the Proposed Action

All 7.8 acres of disturbed and undisturbed remnant sand dunes on the site will be destroyed for housing construction. Construction of the back row of condominiums and



back two streets will completely destroy the existing 1.88 acres (1000 plants) of *E. latifolium* and all SBB (adults, eggs, larval stages, pupae) that may be supported by this habitat. It is impossible to estimate the numbers of SBB currently on the property due to the difficulty of locating and correctly identifying sub-adult stages. Thus we cannot quantify project impacts on individuals of the species. Installation of houses, paved streets, sidewalks, parking areas and exotic landscaping, including probably ice-plant, will doubtless preclude re-invasion of the housing area proper by *E. latifolium* or SBB.

Future productivity of the site as SBB habitat will also be foregone. Even isolated islands of *Eriogonum* can support relatively dense populations of SBB. If we apply Arnold's densities at Ft. Ord, the Phillips site (0.76 hectares) could, assuming no expansion of *Eriogonum*, support 105 females and 163 males. Since buckwheat has increased rapidly in the last few years (and presumably will continue to do so), the potential to support SBB is probably much greater than these estimates suggest. Given its size, habitat quality (albiet [sic] degraded) and location the Phillips site has the potential to support larger populations of SBB if left undeveloped. Enhancement actions to retard iceplant would be desirable and probably even required to achieve full habitat potential.

We must dismiss arguments that the site could not or does not support SBB (Earth Metrics 1982). Such statements reflect a 1981, or earlier, cursory evaluation of habitat conditions when only 65 plants were counted on the site (Arnold 1982). Lack of SBB sightings during annual searches from 1981-83 would, of course, tend to support this conclusion. We have little confirming data on

the scientific rigor of any searches for SBB on the site. However, we are prepared to accept that even moderately conscientious [sic] search surveys during mid-June to mid-September in the vicinity of *Eriogonum* (which has been accurately mapped) would have at least resulted in some sightings of SBB.

Insect species represent such obscure, complex ecological entities that accurate assessments of habitat quality and utilization cannot be derived from one or even a few field examinations.

Neither is the information available on the occurrence of SBB larvae on the site particularly scientific. No examinations were conducted by entomologists with the experience and knowledge to identify the specimens. Conclusions were drawn only from second hand descriptions. Nevertheless, this represents the best scientific information available and we are again prepared to accept the conclusions that at least one larva sighted on *E. latifoium* on the Phillips site was SBB.

Despite the lack of scientific quantifications we would otherwise prefer, the scattered facts fit a pattern that we believe to be characteristic of the ecology and behavior of some rare blue butterflies of California. Host plants, typically short-lived, pioneer species adapted to exploit areas of surficial disturbance or unstable conditions (i.e. steep topography, erosion, shifting sands), become established on a site. Initially they can not support the lepidopteran species of interest. With increasing plant biomass, and a reasonably local population of the butterfly, first a few, then many individuals are supported on the site. With increasing age and senescence of the host

plant, the butterfly population declines, then may disappear altogether as exotic plant species become dominant or recruitment of new host seedlings is otherwise precluded. This dynamic ecosystem interrelationship results in butterfly "hot spots" (Thomas Reid Assoc. 1982) analogous to the the [sic] island clustering of the host plant itself. Some Ft. Ord study plots that were productive in 1979 are, today, little utilized by SBB (Arnold 1983).

The increasing number of buckwheat plants on the Phillips site is indicative of the "invasive phase" of the host plant. Arnold contends it may take seven years for host plants to achieve sufficient biomass to support SBB (Arnold 1982). By 1984 plants may have been robust enough to support at least a few immigrant SBB (Arnold 1984). Even if valid, the strategy of selecting larger host plants on which to lay eggs is undoubtedly not infallible [sic]. Thus SBB females may lay some eggs on buckwheat that is too young to support larvae, with larval starvation the result. Heavy parasitism of larvae is known (Arnold 1983) and could conceivable [sic] extirpate tiny colonies until a sufficient number of larvae survive to complete their life cycle. The one (or three) larvae collected in 1984 could represent early colonization by SBB that, given time, would develop into a vigorous population.

Bright's sighting of a Smith's blue on State Parks property and Arnold's collections of SBB from *E. parvifolium* indicate the probable sources of these early colonizations. Adults are attracted to both host plants where they grow in proximity to one another (Langston 1975). Despite limited vagility of SBB adults, the *E. parvifolium* is only about 120 meters from the nearest larval collection (coincidentally, the one believed to be SBB), well within the

flight capability of SBB. Most SBB movement at Ft. Ord colonies was from west to east and attributable to strong onshore winds (Arnold 1983). Such a barrier may also be functioning at the Phillips site. The high back dune separating the *E. latifolium* from the *E. parvifolium* on Del Monte Avenue may also be an obstacle to SBB movements. In our view such barriers would only slow, not stop, SBB dispersion. After 40+ years of abandonment, the SBB appears to be reclaiming the Phillips site. We would expect this trend to continue along with competition from the encroaching iceplant. Arnold (1983) has theorized two separate "host races" of SBB, one adapted to *E. latifolium* and one adapted to *E. parvifolium*. With time (thousands of years) the two races could become reproductively isolated and, thus, eventually be considered separate species (sympatric speciation). Such a theory may be consistent with the variations in morphology, and ecology of *Euphilotes* species, and the varying host buckwheat preferences noted at inland SBB colonies (USFWS 1984). Ecological, even behavioral differences are often utilized by taxonomists to differentiate species and subspecies. At this time such a hypothesis cannot be confirmed and we must conclude that "latifolium" SBB are not reproductively isolated from "parvifolium" SBB. Arnold (1984) essentially concurs. Thus SBB on adjacent properties probably have and will continue to colonize the Phillips site absent development.

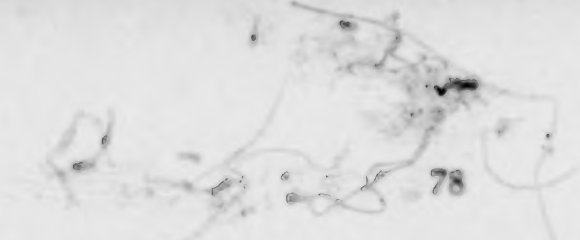
Another mystery of lepidopteran population dynamics relates to the interrelationship of established colonies. Isolated colonies cannot survive without continuous recruitment of vigorous new host plant seedlings. Extirpated colonies can be re-established by immigration of



new individuals from nearby habitats (Murphy and Ehrlich 1980). Genetic integrity of species is maximized by interbreeding and exchange of adults among colonies. With low vagility, colonies must necessarily be in proximity to one another.

Barriers to interchange have been examined (Thomas Reid Assoc. 1982). Generally, narrow roads, low shrubs and narrow stretches of unsuitable terrain are not insurmountable. Greater distances can be traversed if butterflies can reach intermediate islands of habitat. Loss of the Phillips site may interrupt whatever genetic exchange may be occurring between adjacent SBB colonies. Considering that successful, confirmed SBB collections were made only from the railroad right of way next to Del Monte Avenue (off the Phillips site), it is possible that any active interchange of adult SBB occurred through [sic] that corridor and did not involve utilization of the Phillips site proper. The 1984 SBB larvae, even in small numbers, from the Phillips site casts some doubt on even this tentative conclusion.

The importance of the Phillips site in relation to other nearby SBB colonies involves questions of population dynamics we can only speculate on at this time. There is no doubt however in our view that the Phillips site, left undeveloped, would soon become an active pathway for genetic interchange. Its size, location and the presence of additional habitat on the adjacent State Parks property support this view. The effect of the loss of the Phillips site on nearby SBB colonies is speculative at best. There simply has not been sufficient basic research conducted with this species to clarify this issue.



Though it will have adverse impacts on SBB by destroying existing habitat and foreclosing the possibility of future long term productivity for the species, we are unable to conclude that loss of the Phillips Petroleum site will threaten the survival and recovery of the species as a whole. The numbers, distribution, and/or range of the species are not likely to be appreciably reduced with this action. Survey information indicates that utilization of the site by SBB is low at present. The existence of many other populations, both coastal and inland, and the probability that undiscovered colonies are extant militate against paramount concern for the Phillips site.

The restoration plan for the site, while only conceptually outlined at present, has little chance for long term success in our opinion. While such schemes appear feasible in design, they are extremely expensive, long term propositions and, to our knowledge, none have been particularly successful from a biological point of view. Individual species can be emphasized with at least initial success, but the sand dune ecosystem as a whole is too complex to recreate and maintain on a large scale.

Our efforts to plant buckwheat seedlings at our Antioch Dunes National Wildlife Refuge have met with limited results. Extremely high mortality of seedlings and constant encroachment of exotic weed species has negated much of our effort. Moreover, we have not been able to sustain a sufficient annual program of outplantings. Our program at Antioch Dunes NWR cannot be considered a successful "restoration" program.

A sand dune restoration effort, following installation of the regional sewer line along the front of the Phillips site,

has yeilded [sic] some regrowth of mostly exotic trees and grasses. Snow fences have trapped some sand to maintain a naturally appearing topography. While the limited objectives of that plan (Richard Murray Assoc. 1981) were essentially achieved, the emphasis was on exotic plant species and heavy irrigation, hardly natural sand dune ecosystem elements.

There is no question that the applicant can clear out some iceplant from the back dune and replant buckwheat seedlings during intensive initial efforts and expenditure of funds. However, any effort that will be of benefit to SBB will take a minimum of seven years of constant battle against the forces of seedling mortality, encroachment of iceplant and the vagaries of SBB behavior. Unfortunately, condominium construction will have destroyed all the existing SBB resource in the vicinity and there will be no proximal SBB population to recolonize even the most robust areas of buckwheat restoration. From an endangered species standpoint, even the most successful restoration will have to await the chance immigration of SBB or artificial translocation of egg-bearing females.

The increased traffic, possible construction on adjacent property and the inevitable presence of people, pets and perhaps ORV will reduce, if not negate, the effectiveness of any restoration. Routing the access road through the restoration area will undoubtedly bring a call for stabilization of sand to prevent drifting over the roadway. This of course is counter to the need for open, shifting sand favored by the host buckwheats.

The greater chance for success in any restoration plan would involve redesigning the construction to preserve at

least some of the existing *Eriogonum*. A vigorous restoration effort, preferably [sic] linked to enhancements on adjacent State Parks property would still be required. Notable examples of construction redesigns to protect endangered butterfly habitats include San Bruno Mountain housing (San Mateo County) and Gullwing Inn in Marina. Neither project suffered substantial loss of units or economic viability while contributing to the chances for survival and recovery of endangered species.

#### Cumulative Effects

Cumulative effects are those adverse impacts to the species of concern from other state and private actions that are reasonably certain to occur prior to completion of the subject federal activity. An action is "reasonably certain" to occur if it requires the approval of local government or land use agencies and such agencies have essentially approved those actions. Activities not requiring local government approvals must be essentially ready to proceed.

A number of both state and private activities have been identified that will adversely affect SBB. It is uncertain whether they will be completed prior to completion of Del Monte Dunes condominiums because of extensive local and state government approval processes. None that we have identified have received final approvals from local regulatory agencies and therefore they cannot be considered cumulative to this action.



### Biological Opinion

It is our Biological Opinion that approval of federal home loan guarantees for the Phillips Petroleum site is not likely to jeopardize the continued existence of the Smith's blue butterfly.

### Incidental Take

Section 9 of the Endangered Species Act prohibits any taking of listed species without specific exemption. Under the terms of Sections f(b)(4)iii and f(o)(2), taking that is incidental to and not intended as a part of an agency action is not considered taking within the bounds of the Act, provided such taking is in compliance with any terms and conditions stipulated in a biological opinion.

In such instances our Service will provide a statement specifying the extent and impact of incidental taking along with measures we consider necessary to minimize such taking. Based on the characteristics of the species, results of field surveys and the questionable taxonomy of larvae, we believe incidental take will be impossible to identify or measure but will occur though minor. It is our opinion that given the present circumstances, numerical losses will be small and of little consequence to the species as a whole. As such we have no term and conditions to offer that will minimize such taking.

In furtherance of the purposes of the Endangered Species Act (Sections 2(c) and 7(a)1) which mandates federal agencies to utilize their authorities to carry out programs for conservation of listed species, we recommend that the

project be redesigned to preserve at least the larger colonies of host buckwheat in the east corner of the property. Thus development should be restricted to the area west of Seafoam Street. This would best assist conservation of the species on site and improve the chances for success of any restoration. Local and state government land use agencies will continue to review and evaluate the design for housing on the site.

Access to the development has been a point of contention during local planning for the site. The greatest benefits to SBB would derive from designing a different access scheme that would avoid entrance across the back dune. This could allow for more isolation and thus protection (via fencing) for areas where restoration is proposed. Access from Tide Street on the west and Dunes Drive, through the State Parks parcel on the east have been considered but both have legitimate drawbacks. The State Parks Department is currently beginning a general planning process for its Monterey parcel which will undoubtedly include upgraded road access. We believe a workable access route through the State Parks land should continue to be pursued as the least impacting to SBB.

This concludes formal consultation on this project. If the proposal is significantly modified or if new information becomes available on listed species or impacts to listed species, reinitiation of formal consultation with our Service should be considered. Specifically, should the development not qualify for VA programs, or should the development voluntarily drop out of the program, this Biological Opinion would no longer be applicable. We

would appreciate notification of your final decision on this project.

Sincerely yours,

/s/ William F. Shake  
William F. Shake  
Assistant Regional Director  
Federal Assistance

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**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**

STATE OF CALIFORNIA - THE RESOURCES AGENCY  
GEORGE DEUKMEJIAN, Governor

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DEPARTMENT OF FISH AND GAME (Seal)  
Illegible NINTH STREET  
SACRAMENTO, CALIFORNIA 95814  
(916) 445-3531

May 10, 1985

Mr. Bill Fell  
Planning Services  
City of Monterey  
Monterey, California 93940

Dear Mr. Fell:

On April 19, 1985, members of my staff had the opportunity to review the Ponderosa Pine project with Mr. and Mrs. Bright. Since that time, we have reviewed the materials provided and have the following additional comments and recommendations.

We concur with the March 22, 1985 remarks of Mr. William Shake in his letter to the Veterans Administration that the subject project would be " . . . of little consequence to the butterfly species as a whole." However, as the discussion in Dr. Arnold's August 17, 1984 correspondence indicates it is not the species as a whole, but rather the population of an endangered species on the development site that is at issue. The data analyzed by Dr. Arnold and the U. S. Fish and Wildlife representatives indicates the project could be adverse to the future populations at the site in spite of the several mitigation efforts proposed in the revised plan.



We concur with Dr. Arnold's findings and recommend the following measures be incorporated in the habitat protection design to ensure the survival of the on-site population of the butterfly:

- 1) Add a provision to the Homeowners Association contract which states, "the Association will be responsible for maintaining and replacing the Smith's blue host plants (i.e. either of the two species of the buckwheat, *Eriogonum*) that occur in the habitat restoration zone of the project.
- 2) In line with the suggestions of the March 22, 1985 Fish and Wildlife Service letter, the remnant of existing butterfly habitat on the east corner of the property be included in a plan to manage it as part of the adjacent habitat belonging to the State Department of Parks and Recreation. Such action would not only protect the habitat in the State parcel, but enhance the value of the remnant of natural habitat that would remain on the Ponderosa site.
- 3) The Department be added to the review group for threatened and endangered plan preservation cited in Section 4 of the August 30, 1984 correspondence. This is in addition to being responsible for review of the habitat conditions.

We believe the measures outlined above would result in the protection of the endangered wildlife species on the project site and still permit the modified project to proceed subsequent to implementation of the above actions.

Thank you for the opportunity to discuss our concerns with you.

Sincerely,

/s/ Illegible  
for Jack C. Parnell  
Director

cc: Don Bright

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**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**

[LOGO] **MONTEREY  
PLANNING & COMMUNITY  
DEVELOPMENT DEPARTMENT  
ZONING REPORT**

**DATE OF REPORT:** August 9, 1985

**COMMISSION MEETING:** August 13, 1985

**APPLICATION NO.:** Tentative Map 84-09

**AGENDA ITEM:** J-1

**APPLICANT:** Davis, Jacoubowsky, Hawkins Associates

**PROPERTY OWNER:** Darrel Spence

**PROPERTY ADDRESS:** 2301 Del Monte Avenue

**PARCEL SIZE:** 37.6 acres

**EXISTING ZONING:** R-G-W-20

**GENERAL PLAN**

**DESIGNATION:** Residential - Low-Density (two to eight dwellings per acre)

**ENVIRONMENTAL**

**FINDING:** Exempt (Previous EIR certified)

**PROJECT**

**DESCRIPTION:** The proposed project is to develop 190 condominiums on 37.6 acres. The site acreage is assigned as follows:

1. Buildings and patios - 5.1 acres
  2. Public streets - 2.5 acres
  3. Private streets - 4.2 acres
  4. Landscaping - [7.9] acres
  5. Public Open Space [17.9] acres
- For a total 37.6 acres.

The condominiums are proposed to be developed as follows:

	Square Feet	Dwelling Units
1. "A" Units		
Three-bedroom	6,469	60
Two-bedroom	2,047	34
Subtotal		94
2. "B" Units		
Two-bedroom	2,978	66
3. "C" Units		
Two-bedroom	1,564	30
<b>TOTAL</b>	<b>236,760</b>	<b>190</b>
4. Dwelling Units per Acre 5.05 dwelling units		

The parking is proposed as follows:

1. Covered spaces - 284
2. Uncovered spaces - 242
3. Public spaces - 68
4. **TOTAL - 594 spaces**

This project has a long and complicated history. It began back in 1981 when Ponderosa Homes requested a 344-unit project approval. This request coincided with preparation of the City's Coastal Land Use Plan for Del Monte Dunes. That Land Use Plan has still not been certified by the Coastal Commission. The history of the project is as follows:

1. In 1981, Ponderosa Homes requested a Planned Unit Development and Tentative Map for 344 units.



2. On August 9, 1983, the Planning Commission denied the Tentative Map and Planned Unit Development request for 344 units.
3. On December 13, 1983, the Planning Commission denied a Tentative Map and Planned Unit Development for 264 units.
4. On July 24, 1984, the Planning Commission denied a Tentative Map and Planned Unit Development for 190 units.
5. On September 13, 1984, the City Council overruled the Planning Commission and approved a Site Plan, known as Scheme "D," for 190 units. The City Council conditioned that approval (see attached) by referring the amount of public parking, the view corridors, and maximum total floor area to the Planning Commission.
6. On April 9, 1985, the Planning Commission approved the amount of public parking, the view corridors, and maximum total floor area with conditions. Those conditions were:
  1. That an additional eighteen public parking spaces be provided as indicated on the revised plan.
  2. That there be sufficient signage on top of the bluff at the parking lot area and the highway regarding public parking.
  3. That the Architectural Review Committee be given the discretion to reduce the floor area by a maximum of 15% as indicated [sic] by the City Council and that it can be used for site amenities, either modulation of mass and scale, landscaping, or setbacks.
7. The Planning commission conditions were appealed by the applicant. On April 12, 1985, applicant withdrew appeal.

8. On June 18, 1985, City Council heard a request by the Architectural Review Committee for authorization to amend the approved site plan. City Council referred the request to the Tentative Map process. They concluded that these issues would be addressed when the Tentative Map is ready for Council consideration.
9. On August 13, 1985, Planning Commission will consider Tentative Map.

#### COMMISSION DECISIONS:

1. Under the City Subdivision Ordinance, the Planning Commission shall review the Tentative Map, this report, and by resolution, recommend to the City Council the approval, conditional approval, or disapproval of the Tentative Map. However, since most of the issues normally addressed in a Tentative Map have already been decided by previous City Council decisions, the Planning Commission's only action is to:
  1. find the Tentative Map in compliance with the September 13, 1984 City Council approved Site Plan (Scheme D).
  2. review and approve changes made by the Architectural Review Committee.
  3. find the Tentative Map in compliance with Council and Commission imposed Conditions of Approval.

#### STAFF CONCERNS: Staff concerns fall into five categories:

1. Does the Tentative Map comply with City of Monterey General Plan and City adopted Del Monte Dunes Land Use Plan?
2. Does the Tentative Map comply with the City Subdivision Ordinance and City policies and standards?

3. Does the Tentative Map comply with outside agencies' policies and standards?
4. Does the Tentative Map comply with City Council and Planning Commission conditions of approval on previous project decisions?

The attached August 7, 1985 memo from Coastal Planner Haywood Norton states that he has reviewed the proposed Tentative Map for the Del Monte Dunes project and found no inconsistencies with the Del Monte Beach Land Use Plan as adopted by the City. Since the Del Monte Beach Land Use Plan is used to determine General Plan consistency, it can be concluded that the proposed Tentative Map does comply with the General Plan.

The second staff concern deals with the Tentative Map's compliance with City Subdivision Ordinance including City policies and standards.

Procedurally, the proposed Tentative Map appears to comply with the City Subdivision Ordinance. Attached are memos from the Public Works Department and Fire Department on the project's compliance with City policies and standards. We received no other comments from City departments.

The third staff concern is the identified agencies policies and standards. Attached are letters from California-American Water Company and Monterey Disposal Service, Inc. The Cal-American Water letter directs the applicants to an acceptable water line connection. The Monterey Disposal letter raises concerns about trash collection from the subdivision. These concerns can be addressed through conditions of approval on the Tentative Map.

Staff's major concern is with the Tentative Map's compliance with City Council and Planning Commission conditions of approval on previous actions. The attached 13 September 1984 conditions of approval shall be reviewed condition by condition:

1. *SITE PLAN:*

Item a appears to be complied with. There are no proposed structures encroaching into the regional sewer easement. According to the Fire Department, the northwesterly lots have been redesigned and do not impact emergency access. On item b, Public Parking, the applicant has provided 18 additional spaces to his original 50 spaces for a total of 68 parking spaces. On item c, the Planning Commission should refer to the Architectural Review Committee report. The Architectural Review Committee has recommended approval of the Tentative Map. They did not reduce the total floor area. It thus remains for the Planning Commission to recommend the maximum total floor area (and without garages) of 236,760 square feet or something less. On item d, the Architectural Review Committee is recommending the Tentative Map solution on the view corridor alignment.

2. *PROCESS:*

Again, the Tentative Map has been reviewed by the Architectural Review Committee. Please see the Architectural Review Committee report (attached).

3. *SMITH'S BLUE BUTTERFLY:*

The developer has prepared a sand dune restoration program to preserve the habitat of the Smith's Blue Butterfly. Attached is a letter from the California Department of Fish and Game conditionally approving the habitat restoration program. We lack



approval of the program by the U. S. Fish and Wildlife Service. Apparently, they are concerned with a private homeowners association maintaining the habitat. On the other hand, they lack the funds to maintain the habitat. The City of Monteley [sic] must, therefore, decide whether to approve the habitat program without U.S. Fish and Wildlife Service approval.

4. *RARE AND ENDANGERED PLANTS:*

The Sand Dune Restoration Program addresses the rare and endangered plants condition.

5. *ACCESS:*

The Public Works and Fire Departments have reviewed the access (see attached memos). The proposed access appears satisfactory. The requirement that boardwalk design be approved by the Architectural Review Committee can be met when Architectural Review Committee grants final approval to the project.

6. *FENCING:*

Architectural Review Committee has not evaluated fencing on the site. This would be an appropriate review item when Architectural Review Committee considers final approval of the project.

7. *GRADING:*

The applicant has prepared a Grading Plan. That Grading Plan has been reviewed by the Public Works Department (see attached memo). Site grading appears to be satisfactory.

8. *UTILITIES:*

This condition required all utilities be underground. This condition will be monitored through the progress of the project.

9. *FIRE DEPARTMENT REQUIREMENTS:*

See the attached Fire Department memo for compliance with this condition.

10. *PUBLIC WORKS DEPARTMENT [sic] REQUIREMENTS:*

See the attached Public Works Department memo for compliance with this condition.

11. *HOME OWNERS' ASSOCIATION:*

The Home Owners' Association agreement is attached. It has been reviewed and approved by the City Attorney as meeting the requirements of this condition.

12. *SOUNDPROOFING BETWEEN UNITS:*

This condition requires each unit be appropriately soundproofed. This condition will be monitored as [sic] the plan check and building inspection stage.

13. *PARK DEDICATION FEE:*

This condition required that an Open Space easement to the City be dedicated for the areas seaward of the development line and on the back dune. There is no statement on the Tentative Map dedicating those areas. It could thus be a condition of the Tentative Map that those areas be dedicated. Since these are the habitat areas, it may be more appropriate to put these areas into the common open space category for the Homeowners' Association to operate and maintain.

14. *AFFORDABILITY AGREEMENT:*

This requires the applicant to comply with the City's moderate-income housing requirements. The applicant has submitted a letter saying that he wishes to provide housing on-site to meet that requirement.

15% of the 190 units, or twenty-nine units will be required to be moderate-income housing. The developer proposes to construct, [sic] "an appropriate percentage . . ." of affordable units with each phase. It should be a condition of Tentative Map approval whether this is acceptable to the City.

#### 15. EXPIRATION:

This is the Use Permit's expiration.

It appears that the Conditions of Approval have been addressed and substantially met by the applicant's Tentative Map. While the Smith's Blue Butterfly Habitat Preservation Program has not been approved by the U.S. Fish and Wildlife Service, it may be appropriate for the City of Monterey to take a position approving the wildlife habitat program and assigning the responsibility for maintaining the habitat to the Del Monte Dunes project Homeowners' Association. If, at some later point in the review process (for example, during the Coastal Permit phase), the California Department of Fish and Game or U.S. and Wildlife Service wish to add additional requirements, they could.

**STAFF RECOMMENDATIONS AND FINDINGS:** Staff recommends that the Tentative Map be approved, finding that:

1. The design or improvement of the proposed subdivision is consistent with the objectives, policies, general land uses, and programs of the City's adopted General Plan and Del Monte Land Use Plan.
2. The site is physically suitable for the type and density of the proposed development.
3. The design or improvements of the proposed subdivision are not likely to cause substantial environmental

damage or substantially and avoidably injure fish or wildlife or their habitat.

4. The design of the subdivision or the type of improvements is not likely to cause serious public health problems.
5. The design of the subdivision or the type of improvements will not conflict with easements acquired by the public at large for access through or use of property within the proposed subdivision.

#### SUGGESTED CONDITIONS OF APPROVAL:

The current Planned Unit Development Conditions of Approval should be maintained. Additional conditions are:

1. The developer shall continue to attempt to secure approval of the Dune Restoration Program by the U.S. Fish and Wildlife service. Any significant changes to the Tentative Map as a result of that review will require an approval by the City of Monterey and may require resubmittal of the Tentative Map.
  2. The sand dune area seaward of the development and the back dune area between the development and Del Monte Avenue shall be placed in common ownership for sand dune Smith's Blue Butterfly habitat operation and maintenance.
  3. The Architectural Review Committee shall pay particular attention to the height and design of retaining walls proposed in the project, particularly on the access road along the ease [sic] boundary.
  4. Affordable housing units may be constructed with each phase provided that the appropriate percentage provided for each phase is at least 15%.
-



UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

CITY OF MONTEREY

To: Community Development Director  
From: Senior Planner (Norton)  
Date: August 13, 1985  
Subject: Status of Approvals of Proposed Restoration  
Plan of the Del Monte Dunes Project

Recently there has been some question as to whether or not the July 25, 1985 letter from the State Department of Fish and Game represents approval of the proposed restoration plan for the Del Monte Dunes project. This afternoon, I talked to Bruce Elliott of State Fish and Game staff and he stated that the July 25th letter does represent approval subject to the conditions listed in the letter and State Fish and Game's May 10, 1985 letter. Mr. Elliott strongly emphasized condition 2 in the July 25th letter which recommends that the area designated to be restored butterfly habitat would subsequent to restoration be dedicated to a State agency such as the State Parks and Recreation Department.

I also talked to William Shake, Deputy Regional Director of the U. S. Fish and Wildlife Service in Portland, Oregon. Mr. Shake explained that Fish and Wildlife's comments would be limited to the March 22, 1985 letter stating the biological opinion that the Del Monte Dunes project as proposed would not jeopardize the continued existence of the Smith's Blue Butterfly. Mr. Shake also explained that although the biological opinion contained recommendations as to how the proposed restoration plan

could best be implemented, these recommendations were only recommendations which could, at the discretion of other agencies, be used as conditions of approval. The State Department of Fish and Game is recommending that these conditions be a part of any approval of the proposed restoration plan.

/s/ Haywood Norton  
Haywood Norton

HN:ras

attachments

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

CITY OF MONTEREY  
PLANNING COMMISSION MINUTES  
JANUARY 28, 1986

Motion: On motion by Hollingsworth, seconded by Cunningham, this matter is continued to March 25, 1986, by the following vote:

AYES: 6

COMMISSIONERS:

Cunningham, Hambaro, Hollingsworth, Kracht,  
Menmuir, Villa

NOES: 0

ABSENT: 3

COMMISSIONERS:

Edgren, Ragan, Unappointed

2. Application: DEL MONTE DUNES (PONDEROSA HOMES), Tentative Map 84-09; Review Final EIR; 2301 Del Monte Avenue, C-3, R-G-W-20

Consider Tentative Map.

Appearances: Paul Davis, project architect; Don Bright, consultant; Mary Anne Matthews, California Native Plant Society; Joyce Stevens, Jenny Feigens, Ventana Chapter, Sierra Club; Rick Heuer; Mary Bell Hughes; Ed Leeper; Richard Lind, Del Monte Beach Neighborhood Association;

Staff

Discussion: Mr. Fell advised the Commission that it has now been supplied with the various items requested at the December

10, 1985, meeting, including the Final EIR, elevations, sections, the final restoration plan, and all suggested Conditions of Approval. He discussed the various Conditions and amendments to them. He made reference to a letter from Rick Heuer. Mr. Fell stated the one question which has not yet been answered is whether the final restoration plan has been approved by the Departments of Fish and Game and Fish and Wildlife, and he asked that the applicant address that concern.

Applicant: Mr. Davis made a slide presentation of the view corridor aspect of the project. He stated building up the dune will substantially improve screening and mitigate concerns expressed in Mr. Heuer's letter. To query about affordable housing units, he responded they are all located in Unit C.

Consultant: Dr. Bright gave a brief overview of the preservation and restoration plans. He said both the Department of Fish and Game and Fish and Wildlife declined to review the changes to the restoration plan because they had previously reviewed it. They do not have the resources to do so. The main goal of the restoration plan is to provide the potential for maximizing the preservation of the Smith's Blue Butterfly. He explained the City will not allow access through Tide Avenue, and the State will not allow access through the State park. To questions concerning



when approvals of the restoration plan could be expected, Dr. Bright stated prior to the issuance of City permits. He said the Coastal Commission's approval must also be obtained.

Commission  
Discussion:

Ms. Hollingsworth stated one of the critical view points is from the beach looking up. The Commission discussed Mr. Shake's letter being contradictory to the statements made by Dr. Bright, especially concerning access. Mr. Villa stated the access being proposed appears to be the one which would cause the most harm to the Smith's Blue Butterfly. Ms. Kracht expressed concern that with construction, the habitat will be removed. The ice plant is to be removed. The Buckwheat will not have matured, and she asked what is to happen to the Smith's Blue Butterfly during the move. There was discussion concerning maintenance of the restoration plan. Concern was expressed regarding the east portion of the preservation. It was suggested the habitat area be increased. The Commission said it wants the fencing up prior to any restoration activities.

Consultant:

Dr. Bright stated two species serve as the food source, and during the move the other available source could be utilized. Responding to questions about what would stabilize the sand dunes when the ice plant is removed, Dr. Bright said the ice plant roots would

remain, which would provide the necessary stabilization. Dr. Bright said maintenance will be the responsibility of the developer, and the State Parks and Recreation Department is being considered as manager of the plan.

Public  
Discussion:

Ms. Matthews said her organization has given highest priority to the preservation and restoration of the Monterey dunes. She expressed disappointment that Dr. Arnold's recommended changes to the site plan have not been made. Contrary to Dr. Bright's statements, she said there are populations of Buckwheat within range of the Smith's Blue Butterfly. If this project is approved, gene interchange will be cut off. She quoted from letters from the Department of Fish and Wildlife and pointed out the inconsistencies with Dr. Bright's statements. The main point is that both Dr. Arnold and the Department of Fish and Wildlife state most of the habitat will be destroyed by this plan. Ms. Stevens said 190 units translates into approximately 500 persons on this site and impacting the beach. She said City Resolution 84-51 allows between 150 and 190 units to be built, and she would like to see the number reduced. She recommends that the back row of units (approximately 20) and some other buildings be removed from the project because that is the location of the Buckwheat. Ms. Feigens stated this

project would impact our coastal view, traffic flow and the recreational trail. Access to the project is a problem. The size of the project will destroy the habitat, and she asked that the number of units be reduced. Mr. Heuer discussed the sightline from the Holiday Inn. He is concerned that there is insufficient information to determine whether or not the site will be visible from the Holiday Inn. Mary Bell Hughes expressed concern about inadequate access to the public and State beaches. She stated only one access point will create a hardship to the beach. Mr. Leeper said the project is too large, and he questions whether 190 units is consistent with the City's General Plan. He addressed the importance of the General Plan and read from various sections of it. He also cited the California Coastal Act regarding development. Mr. Lind questioned how the updated EIR addresses the traffic situation. He expressed concern over the entrance's safety and damage that will be caused to the dunes. He urged the Commission to send the project back to the City Council

Consultant: Dr. Bright refuted statements made by various public speakers. He said all of the Smith's Blue Butterfly habitat will not be destroyed; a portion is being preserved. It is untrue that there is little chance of survival for the Smith's

Blue Butterfly. Much of the site is covered by ice plant which grows continuously. The dune species will not prevail unless some changes are made to the present site. His restoration plan is workable.

Applicant: Mr. Davis commented that the buildings Ms. Stevens proposes to eliminate total 56 units, not 20 units. This is not a natural dune area in its natural form. It is a disturbed area. Density is not at maximum. Originally, the R-G standards would allow 900 to 1,000 units on this site. He gave a history of the project and its review process. He stated the issues being discussed this evening are far beyond that directed by the City Council. He asked that action be taken on this project.

Staff

Discussion: Mr. Wojtkowski stated the Use Permit was initially approved by the City Council in August. It was returned to the City Council for approval of conditions in September. The Use Permit expired March 13, 1986. Staff concurs with applicant that a decision be made on this project. The decision is whether the Planning Commission agrees that all the issues have been met subject to conditions. If the Commission does not agree the conditions have been met, the project should be denied.

Commission

Discussion: Ms. Kracht said since this project was sent to the Commission, there have



been the east Del Monte Avenue study, the recreation trail project and the State Parks and Recreation plan, all of which impact this property. she wonders if the City Council would have set up the same kind of conditions in view of these developments. She said access is not the only issue and that land use must also be considered.

Staff

Discussion: Mr. Wojtkowski responded by stating the only viable access is from the south, and he does not believe any of the three plans mentioned by Ms. Kracht are applicable to this project. The only question recently has been one of density. The land use designation is residential. He said he believes the conditions have been met [sic] regarding the restoration plan proposed by Dr. Bright.

Motion: On motion by Cunningham, seconded by Hollingsworth, the Tentative Map is denied by the following vote:

AYES: 6

COMMISSIONERS:

Cunningham, Hambaro, Hollingsworth, Kracht, Menmuir, Villa

NOES: 0

ABSENT: 3

COMMISSIONERS:

Edgren, Ragan, Unappointed

Commission  
Discussion:

Mr. Cunningham stated the view corridors, the view from Highway 1, and the dune restoration plan are not what the City Council desired. Ms. Kracht feels the bulk and mass need reduction. She referred to the 15% floor area ratio reduction, and Mr. Wojtkowski advised there has been a 15% reduction in density, and the Architectural Review Committee concurred with applicant that further reduction to the proposed floor area was unnecessary. Ms. Hambaro suggested the existing habitat be looked at and preserved as recommended by the Native Plant Society by removing the back row of units. She is concerned with extinction of the species, and wants as much habitat preserved as possible. Ms. Menmuir questions the visibility and angle of the buildings caused by the revised grading plan. She expressed concern with the ambiguity of opinions presented. Mr. Villa agreed with Ms. Menmuir, stating a lot of the scientific information is contradictory. Ms. Hollingsworth expressed concern with the view corridors, especially from the beach. She feels the restoration plan is inadequate and inconsistent. She said at the time the City Council approved this project, they were concerned with the view corridors within and without the project. The Council was also concerned that all affordable housing not be in one area.

There being no further business, the meeting adjourned at 11:45 P.M.

APPROVED:

\_\_\_\_\_  
Dan Villa, Acting Chair

ATTEST:

\_\_\_\_\_  
Bill Wojtkowski,  
Secretary

\_\_\_\_\_

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.E.)

FINAL

RESTORATION PLAN FOR THE  
PHILLIPS PETROLEUM SITE  
DEL MONTE BEACH, MONTEREY, CALIFORNIA

Prepared by:

Bright & Associates  
1200 N. Jefferson, Suite B  
Anaheim, California 92807

February, 1986

DEL MONTE DUNES  
RESTORATION PLAN

February, 1986

I. INTRODUCTION

This plan is based on the results of numerous public hearings before the City of Monterey City Council and Planning Commission, specifically City of Monterey requirements for the project and, to the extent feasible, suggestions of the Fish and Wildlife Service and California Department of Fish and Game.

A residential development is proposed on property located in the Del Monte Beach area of Monterey, California (see Figure 1). The site is bounded on the north by the ocean, on the east by the state property administered by the State Department of Parks and Recreation, on the south by private property and the Southern Pacific Railroad spur parallel to Del Monte Avenue and on the west



by the Del Monte Dunes neighborhood, including the Harbor House apartments.

The site, 37.6 acres in total, contains a disturbed Coastal Strand habitat, i.e., a mixture of native and disturbed sand dune and non-native species. The disturbed nature of the site is due to past petroleum activities, construction of Highway 1, planting of ice plant as ground cover, use of the site by off-road vehicles, unauthorized dumping of various kinds of debris, etc. The greatest impact on the dune habitat historically was the introduction of the two species of ice plant to stabilize the dunes while petroleum activities were being conducted. These two species now occupy about 25% of the entire site. Most recently, the greatest impact has been from off-road vehicles.

## II. GOALS OF THE RESTORATION PLAN

The most important goal of this Dune Restoration Plan is to achieve effective restoration, enhancement and maintenance of about 17 acres of the Phillips Petroleum site, e.g., preservation of native dune areas to the extent feasible, phased removal of the ice plant, and addition of a variety of native dune species in appropriate portions of the site.

The general goals of the plan are as follows:

- A. Reduce the potential for uncontrolled sand erosion on certain portions of the Phillips site.
- B. Preserve native dune habitat areas to the extent feasible.

- C. Enhance portions of the site to achieve native-like conditions, e.g., removal of ice plant and existing man-made structures.
- D. Restore dune areas impacted by development of the proposed project.
- E. Preserve certain existing and provide potential additional habitat areas for the Smith's Blue Butterfly, *Euphilotes enoptes smithi*.
- F. Develop short-term and long-term maintenance plans to assure that the restoration activities maintain reasonable vitality.
- G. Provide a restoration program which achieves the goals of the City of Monterey and the Del Monte Beach Local Coastal Plan.
- H. Provide a Restoration Plan that complies with setbacks, density limitations, public parking, public access, viewshed and project access requirements established by the City of Monterey City Council and Planning Commission.

## III. EXISTING SITE CONDITIONS

The project site presently is vacant, but it has been historically altered by three major events: petroleum activities, construction of Highway 1, and, most recently, by construction of the wastewater interceptor line which traverses the site. The dune area over the interceptor line has been altered by the addition of "new" 15' high dunes, jute matting, snow fencing, irrigation, hydromulching and revegetation activities. In addition to these three

major events, there has been extensive damage to the dunes habitat associated with uncontrolled off-road vehicle activities.

Vegetation on the 37.6 acre project site consists mostly of prostrate and succulent groundcover which acts to stabilize the dynamic sand dune environment. Most of the site, about 25%, is covered with sea-fig, *Mesembryanthemum chilense*, and hottentotfig, *Mesembryanthemum edule*. Both of these species of "ice plant" are african plants, i.e., non-native, and they are very hardy, competitive plants. They have, because of a high percent cover of the sand, stabilized most of the project site. They also have displaced some of the less competitive native dune species. There appears to be a continual flux in the abundance of this plant on the site, i.e., it dies back in some areas, and increases in other areas. However, in general, this plant very slowly is occupying a greater percentage of the Phillips site. We estimate that the increase per year, on the average, is about 0.005%.

The native vegetation includes coast live oak (*Quercus agrifolia*), buckwheat (*Eriogonum latifolium*), silver beach weed (*Ambrosia chamissonis*), several species of lupines (*Lupinus* sp.), dune grass (*Poa douglasii*), deerweed (*Lotus scoparis*), and heather goldenbush (*Haplopappus ericoides*). A row of mature, non-native eucalyptus trees are located near the back dune area in the southwestern portion of the site. The coast live oaks primarily are located along the back, protected portion of the dune and they aid in stabilizing that portion of the dune. See Table 1 for a more complete list of plant species identified on the Phillips Petroleum site.

The buckwheat plant, *Eriogonum latifolium*, occurs in patches on several portions of the project site. It is estimated, from field reconnaissance and interpretation of recent aerial photographs, that it now occurs on about 0.5% of the site (1.88 acres). There have been changes in recent years in the number of individual plants of this species on the site. Arnold estimated that there were 65 plants in 1982 and Turner estimated that there were about 250 plants in 1983. Our count of *Eriogonum latifolium* in 1984 indicated over 1,000 plants and about 950 plants in 1985. Although the numbers indicate that there has been a significant increase in plants over the last four years, we believe that this is partially due to the fact that other people were not aware of the property boundaries and, thus, did not count all plants. An increase in the number of plants may indicate two things: first, there may be recruitment, i.e., addition of new plants, and second, certain of the plants may be maturing. The plants presently on the site demonstrate varying [sic] degrees of maturity and survival. Based on random checking of plants during field reconnaissance in June and July, 1984, about 38-40% of the plants are mature; mature indicating a plant of about 0.4 to 0.65 meter (about 16-26") in height, with at least 8 petioles of 3-4 decimeters (about 12-16") in height, and with the inflorescence (flowerhead) about 20-30 millimeters (around 1") in width. In 1985, about 20% of the plants were mature, except for the area located in the extreme northeast portion of the property in which about 80% of the plants were considered mature.

In spite of the increase in the number of plants, the general distribution (occurrence over the site) of



*Eriogonum latifolium* has not increased since 1981, i.e., it is found on only 0.5% of the site.

There is another buckwheat, *Eriogonum parvifolium*, characteristically found in the adjacent sand dunes to the northeast. However, during our field reconnaissance since 1981, we did not find this species on the Phillips Petroleum site. Arnold (1982) found some individual plants of this species along the embankment next to the railroad tracks, Del Monte Boulevard, and California Highway 1. However, these plants were on the property adjacent to the Phillips site.

There are several species of animals commonly found on the Phillips site, namely: western fence lizard (*Sceloporus occidentalis*), alligator lizard (*Gerrhonotus multicarinatus*), tree swallow (*Iridoprocne canadensis*), white crowned sparrow (*Zonotrichia leucophrys*), purple finch (*Carpodacus prupureus*), and a variety of insects, e.g., ants, beetles, flies, etc.

Extensive studies have been completed on the occurrence of the Smith's Blue Butterfly (*Euphilotes enoptes smithi*). Arnold (1983) conducted extensive research on the ecology of this butterfly, particularly at two sites on the Fort Ord Army Reservation located about 2.0 miles east of the Phillips site. Arnold noted that this species is widely distributed as scattered, isolated populations occurring from the Rocky Mountains to the West Coast. Populations are associated with their larval foodplant *Eriogonum*, typically in habitats with sand dunes or rocky hillsides, at elevations ranging from sea level to 3,350 meters. Populations of the Smith's Blue Butterfly confined to coastal Monterey County, occur in various dune

and canyon habitats. There are six dune habitats in the coastal Monterey area, i.e., mouth of the Salinas River, Marina Beach dunes, Fort Ord, Seaside Dunes, Monterey Dunes (Phillips site), and Point Lobos State Reserve. Arnold considers the Seaside Dunes as almost extirpated, and the Monterey Dunes as largely decimated.

No eggs, larvae or adult Smith's Blue Butterflies were found on the Phillips site during our late-June to mid-July field reconnaissance during 1981, 1982, and 1983; further, none were found through July 12, 1984. Arnold (1982) found eight eggs and 42 larvae after examining 130 flowerheads of *Eriogonum parvifolium* located along the railroad track near Highway 1 (Note, that above it is stated that this species of buckwheat was found on the property adjacent to the Phillips petroleum site). Thus, prior to July, 1984, we found no evidence of any life stage of the Smith's Blue Butterfly on the Phillips site. However, on July 12, 1984 we found three larvae; only one of which was identified as SBB. That larva was found on the extreme eastern portion of the property. The occurrence of this larva in 1984, as contrasted with the years 1981 through 1983, most likely is associated with the increased maturity of the *Eriogonum latifolium* plants on the extreme eastern portion of the Phillips site.

During June 1985, about 10% of the plants were examined for butterfly larvae and the general area was examined for butterflies. Approximately 745 blossoms were examined and no larvae were found in any of the blossoms. The area in the northeast corner of the property contains the most native dune-like habitat area, the largest number of *Eriogonum* and the largest number of mature *Eriogonum*. Two additional field reconnaissance

[sic] trips were conducted in the summer of 1985 but no evidence of SBB larvae or adults was found.

Arnold (1983) estimates that the Monterey Dunes (Phillips site) habitat comprises about 1% of the Smith's Blue Butterfly total habitat in the Monterey coastal area. Further, Arnold notes that the successful existence of this species is based on having adequate available, usable space. Recent research has indicated that as the breeding area for butterflies decreases, there is an adverse impact on the survival rate and lifespan of the butterflies. This implies that for patchy habitats, i.e., habitats that are discontinuous geographically and variable in size from small to smaller, species will reach a level where the survival rate will be very low and where the possibility of extinction is very high. This habitat influence is particularly significant for the Smith's Blue Butterfly since the potential for colonization is very low to nonexistent. Unless the habitat on the Phillips site is deliberately increased in size and unless even that increased habitat achieves a greater level of viability, the possibility of the Smith's Blue Butterfly actively and successfully using the Phillips site is deemed to be very low. Since the butterfly has not used the site in recent years prior to 1984, it indicates that the habitat has not been suitable. Further, the limited distribution of the food plant on the site (0.5%), even if the majority of the plants were mature, precludes the site ever supporting a large population of butterflies unless the majority of the site is restored.

#### IV. ACCESS TO THE PHILLIPS SITE

The issue of access has been discussed with various public agencies during the extensive review of the proposed project. Three options were reviewed to access the Phillips site: via Tide Avenue on the western margin of the site, through the state property on the eastern margin of the site, and via Del Monte Avenue on the southern margin of the site. Based on a number of concerns, including analyses of the existing habitat and requirements of a successful restoration plan, access via Del Monte Avenue, with emergency access via Tide Avenue, has been selected by the City of Monterey as the best option. Access via Del Monte Avenue will require the removal of an existing paved road, which varies in width from 16-18', removal of existing buildings and paved parking areas, and loss of about two coast live oak trees. This access will not alter the dynamics of the dune processes since it will be located on the furthestmost inland portion of the dune. Further, this access will allow development of some semi-isolated areas, i.e., away from human activity, where restoration can be carried out to provide potential new habitat for the Smith's Blue Butterfly.

#### V. PROJECT RELATED HABITAT IMPACTS

Residential development is proposed on approximately 19.5 acres of the Phillips site (see Figure 1). This acreage will be used as follows: 4.5 acres for buildings, 4.5 acres for paved streets, and 10.5 acres for landscaping. In addition, there will be about 0.7 acre of paved area for the access road leading from Del Monte Avenue. About



65% of the access road already is paved, and the resultant impacts will be less than if the road were constructed on an undisturbed dune area. The total developed area will occupy about 20.2 acres, leaving about 17.4 acres undeveloped.

The present habitat of the area to be developed, exclusive of the access road, based on field reconnaissance and interpretation of aerial photographs, is as follows: tank pad sites = 0.70 acres; ice plant coverage = 7.70 acres; areas with hardened oil fragments, remnants of pipelines, etc. = 3.30 acres, and dune habitat (both undisturbed and disturbed) = 7.80 acres. We estimate that 65% of this dune habitat is disturbed.

The proposed development will require removal of the tank pad sites, the ice plant, hardened oil fragments, remnants of pipelines and the 7.80 acres of undisturbed and disturbed dune habitat. Accordingly, there will be a loss of some *Eriogonum latifolium* and other dune plants. Construction of the proposed access road will not result in the loss of any *Eriogonum latifolium*, but it will result in the loss of about two coast live oak trees and in the removal of considerable ice plant.

#### VI. RESTORATION PLAN POLICIES AND CONCEPTS

A Restoration Plan is proposed which will preserve, restore and augment existing conditions. The basic components of the plan will:

- Reduce the potential for uncontrolled sand erosion on certain portions of the Development site;

- Allow portions of the dune to remain in their existing state, including areas heavily vegetated with *E. latifolium*.
- Enhance the degraded portions of the site to achieve native-like conditions;
- Replace or restore dune areas lost or damaged by development of the project;
- Provide potential habitat areas for the Smith's Blue Butterfly, *Euphilotes enoptes smithi*;
- Provide a "corridor" for potential butterfly migration along the backside of the dune area by leaving an opening in the "living fence";
- Eliminate the use of snow fencing or jute matting, in order to allow some natural migration of sand; the only exception to this may be in the area along the eastern side of the project site where a dune is required to screen the development from Highway 1;
- Develop short-term and long-term maintenance plans to assure that the restoration activities maintain reasonable vitality;
- Eliminate exotic plants, e.g., ice plant, which tend to out-compete and destroy native vegetation.
- Coordinate restoration efforts with the ongoing, on-site restoration plan, established after construction of the wastewater interceptor line, which traverses the project site;
- Eliminate resculpturing of dunes except to provide the City required visual screen on the eastern boundary of the property.

- Provide protection of the native habitat and the development from uncontrolled wind erosion;
- Provide a restoration program which achieves the requirements of the City of Monterey City Council and Planning Commission and the proposed Del Monte Beach Local Coastal Plan;
- Eliminate use of off-road vehicles on the dune area;
- Provide public use of the beach area, while protecting certain dune habitat areas from trampling; and
- Encourage the State Department of Parks and Recreation to continue restoration activities on their property adjacent to the Development site, especially that portion adjacent to the restoration areas.

To the extent feasible, dunes will remain in their natural condition, i.e., Preservation areas (see Figure 2, Area B). Other areas will have appropriate native plants added to them to help stabilize the dune and prevent sand blowout areas (see Figure 2, Area A). Only one area will be graded to provide an "artificial" dune and this is for visual screening, as required by the City of Monterey (see Figure 2, Area C).

#### A. Preservation Areas

To the extent feasible, dunes will remain in their natural condition and configuration. Primarily, these areas will be parallel to the ocean front, include the northeastern corner of the site and the back dune area,

i.e., north of the access road (see Figure 2, Areas A and B).

Certain areas shall be considered preservation areas, i.e., areas which are not impacted by development and where public access will be restricted. Plants and animals in these areas will have the opportunity to develop without direct human influences (see Figure 2, Area B).

A large area that contains *E. latifolium* in the northeast portion of the site will remain in its existing condition, i.e., all the existing plants will remain except for any ice plant which will be removed (see Figure 3). Ice plant and all manmade structures along the back dune area will be removed, a small amount of sand will be added if necessary, and native dune plants (Type A, see definition below) will be added where necessary. No major grading or artificially recontoured dunes will occur in Preservation Areas (see Figure 2, Area B). The concerns and related policies are as follows:

#### 1. Pre-Construction Activities:

Certain portions of the site will be preserved or only require minor enhancement (Figure 2, Areas A and B). Prior to construction, where no development or only minor enhancement will occur, such areas shall be temporarily fenced to prevent accidental trampling, accidental damage by vehicles/heavy equipment, etc. All construction workers will be informed about these areas and why they are fenced. The fences will remain in place until construction activities are completed.



## 2. Post-Construction Activities:

Following construction activities, preservation areas shall be permanently secured from trampling. A "living fence", i.e., line of coast live oaks, will be placed along portions of the access road. This will be located so that emissions from cars and visitors to the area will not significantly impact the back dune portion of the site. However, the "living fence" will stop before the road curves to go upon the hill. This will assure that the SBB has a potential corridor for migration from areas west of the proposed development. Elevated and marked public boardwalks will be provided from the main public access point (parking area) to the beach to limit trampling of native dune species.

### B. Restoration Areas

Certain areas will be altered by construction activities (see Figure 2, Area C and portions of Area A). Portions of Area A may be impacted by the deposition of sand from onsite grading activities and development of the public parking facilities. A berm is required along the eastern property boundary (see Figure 2, Area C) to provide a visual screen from traffic along Highway 1.

#### 1. Pre-Construction Activities:

In areas where development is proposed, a landscape architect, biologist or other person knowledgeable about native dune species, shall, immediately prior to grading, be responsible for removing and preserving as many native dune seedling plants and seeds as possible. The seedlings will be planted in areas not proposed for development and where no dune restoration is

required or kept either on or off the site where they will be protected from construction activities, visitors to the beach, etc. All such seedling plants must be handled carefully to help assure their continued vitality. It is anticipated that for certain of the species the mortality rate could be high, about 50-60%.

Seedlings and seeds will be obtained from all native dune plants which exist on the Phillips Petroleum site including *Erogonum*, *Haplopappus*, *Ambrosia*, *Abronia*, *Lupinus*, *Lotus*, etc. Also, certain native plants which are no longer common in the area may be reintroduced to the restored dunes, if seeds and/or seedlings can be located, e.g., *Castillaja latifolia*, Monterey paintbrush, *Dudleya caespitosa*, Live-forever, etc. Any coast live oaks removed for the construction of the access road will be relocated immediately to the site for the "living fence."

## 2. Post-Construction Activities

The short-term objective is to restore and stabilize the dune areas altered by construction and other human activities. The long-term objective is to provide additional restored areas which contain native dune habitat and protect the restored areas by precluding unnecessary public access and enforcing an effective maintenance program.

As soon as possible, dune restoration shall be commenced in areas impacted by development. It is very important that revegetation of the dunes begin immediately thereafter to minimize the potential for excessive erosion. The time sequence preferred is as follows: grade the site in the late spring and summer after the strong spring winds; and begin revegetation or

augmentation planting in early fall (October) so that the newly planted seedlings can take advantage of the rainy season.

No irrigation system is proposed as part of this restoration plan as plants could become water-dependent, rather than low water tolerant as is usually the case in dune environments. It is expected that this type of a restoration policy may result in an initially high plant mortality rate; however, the plants that survive will be hardy and better able to cope with the harsh dune environment. Therefore, an aggressive maintenance program is proposed.

No jute matting or snow fencing is proposed as part of this restoration plan in order to simulate a more native type of sand dune environment. The only exception to this may be the use of jute matting in Area C (Figure 2) to assure that the height of this berm is maintained to provide a visual buffer as required by the City of Monterey. This area will be planted with Type A plants (see definition of Type A plants below).

The types of plants used for the restoration plan will vary depending on their location. In the areas most susceptible to wind erosion, i.e., the foredune area, stable, hardy, low-lying dune plants will be used, e.g., *Ambrosia*, *Abronia*, etc. (Type B vegetation). More bushy, woody shrubs, e.g., *Eriogonum*, *Lupinus*, *Haplopappus*, etc., will be placed on the more protected portion of the dunes (Type A vegetation). These plants will provide a reasonably extensive root system and will be important in stabilization of the dune areas.

### C. Plant Types

The species of plants currently identified on the site are listed in Table 1. For purposes of the restoration plan, we have evolved two assemblages of plants, i.e., Type A and Type B. Type A plants will be used in the hinddune and more protected locations and Type B plants will be used on the foredune and the topdune areas.

In areas most susceptible to wind erosion, i.e., the foredune area, Type B vegetation will be planted. No jute matting or snow fencing will be used to stabilize [sic] sand movement. Rather, the more natural dune conditions of minor sand migration will be allowed to continue. The one exception to this may be the berm on the northern boundary of the property which will be constructed to provide a visual barrier to the development from traffic on Highway 1. The height of this dune must be maintained for visual purposes.

Stable, hardy, low-lying dune plants will be placed on the bluff of the dunes, which are subject to the most severe environmental conditions. More bushy, woody shrubs will be placed on the more protected portion of the dunes.

#### Type A Plants:

<i>Baccharis pilularis</i>	Coyote Bush
<i>Eriogonum latifolium</i>	Buckwheat
<i>Eriogonum parvifolium</i>	Buckwheat
<i>Haplopappus ericoides</i>	Heather
	Goldenbush
<i>Lotus Scoparis</i>	Deerweed
<i>Lupinus arboreus</i>	Bush Lupine



Type B Plants:

## Foredune Areas:

<i>Abronia latifolia</i>	Sand Verbena
<i>Ambrosia chamissonis</i>	Sand Verbena
<i>Artemisia dracunculus</i>	Tarragon

## Topdune Areas:

<i>Abronia latifolia</i>	Sand Verbena
<i>Abronia umbellata</i>	Sand Verbena

Please note that this list is for planning purposes and the final list of plant species will be based on discussions with the California Native Plant Society and may include native dune species identified in Table 1 herein.

D. Plant Handling

A plan for sequential removal and some immediate replanting of Type A and Type B plants will be developed with the general contractor. Also, viable seeds will be collected. Such a plan will require careful handling of all seedling plants and seeds.

The seedling plants removed from the site will be immediately planted. New seedling plants will be generated from the seeds collected on the site or from immediately adjacent sites.

In certain areas hydromulching could be used. Seeds to be sowed could include, among others, those from *Abronia latifolia*, *Eriogonum latifolium* and *parvifolium*, and *Haplopappus ericoides*.

On a priority basis, the area to be replanted with Type A plants located between the "living fence" and the

access road/eucalyptus trees, should be developed as soon as possible. Preferably, this area should be prepared for revegetation prior to any development activities. That way, plants in the project area can be relocated, seeds collected, etc., before site improvements begin. It is believed that this area will be the most suited for use by the Smith's Blue Butterfly (see Figure 2, Area B).

E. Public Access Trails

Three major public access trails will lead from the public parking areas to the beach. Elevated boardwalks will be provided and clearly marked to limit unnecessary foot traffic across restoration areas. A well designed access pathway will be required at the area opposite Tide Avenue to preclude indiscriminate entry to the restored dune areas.

The following policies will be implemented:

- Public access to the dune areas and the adjacent beach will be focused by locating the public parking at the end of the entrance road to the project area.
- Public access trails will consist of elevated boardwalks and be clearly marked.
- Occupants of the proposed project will be informed of the presence of public parking and related access trails and advised to call enforcement agencies if they see individuals damaging the public facilities or the adjacent restored dune areas.

### F. Prohibition of Off-Road Vehicles

An extremely important aspect of the restoration plan will be to prevent off-road vehicles from driving on any portion of the dune areas. Such abuse of the dunes will delay/inhibit restoration and preservation activities, disturb the Smith's Blue Butterfly, etc. Therefore, the following policies will be implemented:

- Fencing shall be provided to prevent entry into the dune areas, e.g., where internal roads dead-end; however, such fences shall not prohibit public access to the adjacent beach area.
- Areas established for public access to the dune areas and the beach shall be fenced to prevent vehicular entry.
- Appropriate signs shall be placed at public access points indicating that the use of off-road vehicles on any portion of the dune area and adjacent beach is prohibited.
- A vehicle barricade shall be placed opposite the extension of Tide Avenue; this barricade must be strong enough to withstand easy removal by a winch on an off-road vehicle but also constructed so as to provide an emergency access acceptable to the City of Monterey Fire and Police Departments.
- Occupants of the proposed project will be informed of the dune restoration program and advised to call enforcement agencies if they see off-road vehicles in the dune areas.

### VII. MAINTENANCE PROGRAM

The restoration plan must include a short- and a long-term maintenance program. The short-term program will involve a site walk-through by a landscape architect or the equivalent on about a biweekly basis for at least 18 months after the initial restoration/enhancement activities begin. If the construction of the project takes longer than 18 months, the biweekly visits should extend at least nine months beyond the date of final construction. During the biweekly visits the dune areas will be examined and the following maintenance actions taken:

- A. Dead or dying replanted Type A or Type B vegetation will be removed and replaced as soon as possible.
- B. Areas of sand blow-out, or vegetation trampling will be noted and repaired/replaced.
- C. Any reoccurrence of exotic plants will be noted and all such plants removed, and, to the extent feasible, the area replanted with native dune species.

The long-term maintenance program will involve a site reconnaissance on a quarterly basis to assess blow-outs, trampling, wind damage, damage to public walkways and related signs, etc. Repairs and replanting will be made as soon as feasible, taking into consideration seasonal influences. The developer or an approved designee will continue the long-term maintenance program for a seven-year period after the completion of the project. The restoration areas will then be dedicated to an appropriate public agency, contingent on the restoration areas being in good, viable condition at the time of transfer.



Effectiveness of the long term viability of the dunes restoration plan will depend upon a responsible entity being assigned the responsibility for accomplishing the maintenance in a prudent and efficient manner. The developer currently proposes to dedicate the restoration areas to the State Department of Parks and Recreation.

### VIII. SEQUENCE OF RESTORATION EVENTS

The following sequence of restoration activities must be taken:

- A. The Developer must be bonded prior to initiation of construction or restoration activities;
- B. All Preservation areas will be fenced prior to the start of any construction activities on the site;
- C. All man-made structures will be removed, e.g., asphalt remnants [sic], old buildings, fences, etc.;
- D. Exotic plants, e.g., *Mesembryanthum spp.*, will be removed;
- E. Construction activities will begin;
- F. Areas which will be planted with native dune species will be restored as soon as feasible, i.e., as soon as major construction in the nearby areas is complete, to minimize the creation of major blowout areas; however, October through January is the preferred time for planting of dune species;

- G. Short-term, intensive maintenance activities will begin;
- H. Boardwalks and appropriate signs will be put in place;
- I. Long-term maintenance activities will continue for a seven year period; and
- J. All restoration areas will be transferred to a public agency, e.g., the California Department of Parks and Recreation.

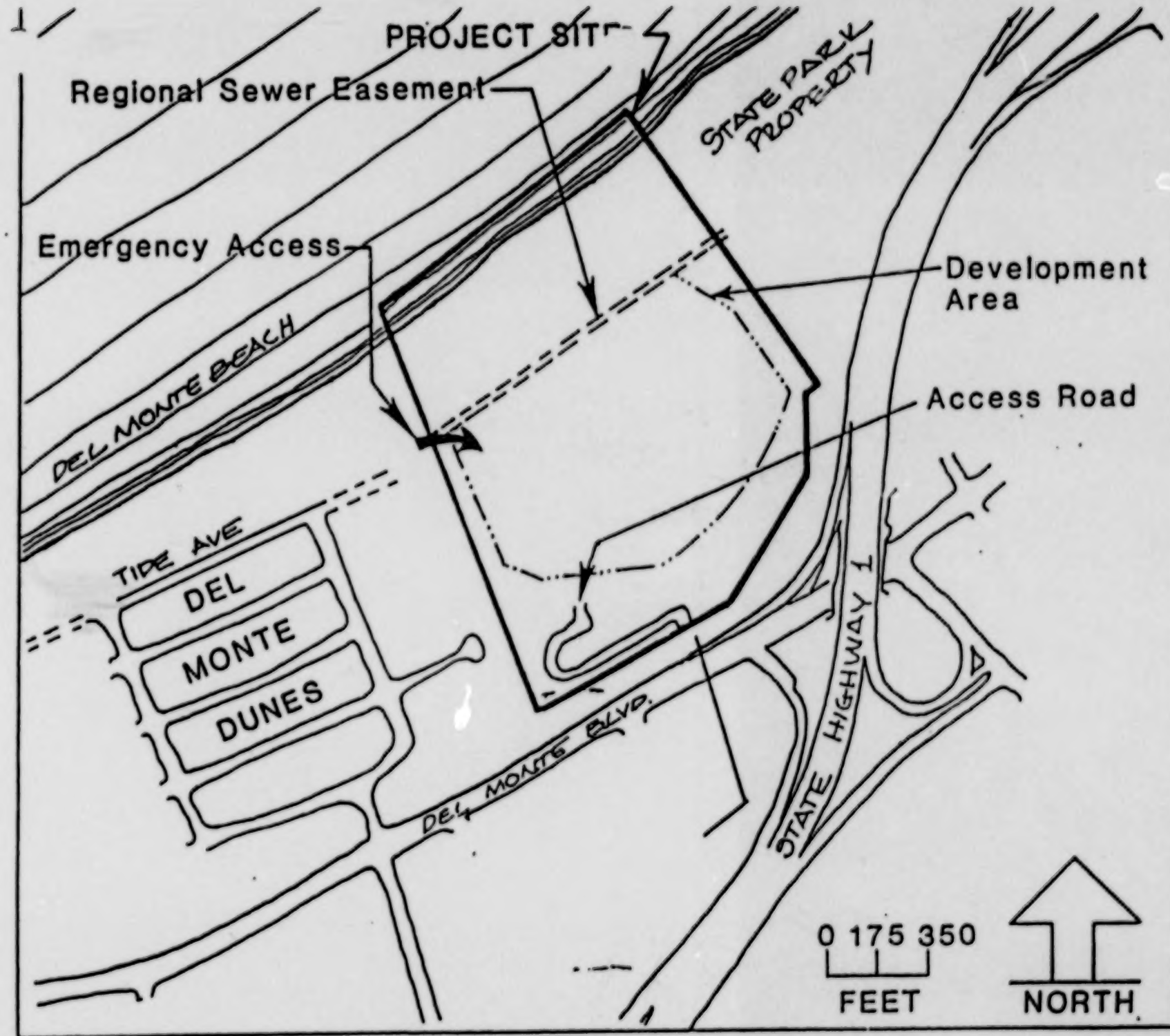
<u>SCIENTIFIC NAME</u>	<u>COMMON NAME</u>	<u>NATIVE OR INTRODUCED</u>
<i>Abronia umbellata</i>	Sand verbena	N
<i>Ambrosia chamissonis</i>	Silver beach weed	N
<i>Ambrosia sp.</i>		N
<i>Ammophilum arenaria</i>	European beach grass	I
<i>Artemisia douglasiana</i>	Mugwort	N
<i>Artemisia dracunculu</i>	Tarragon	N
<i>Artemisia pynoccephala</i>	Beach sagewort	N
<i>Baccharis pilularis</i>	Coyote bush	N
<i>Castilleja latifolia</i> *	Monterey paint- brush	N

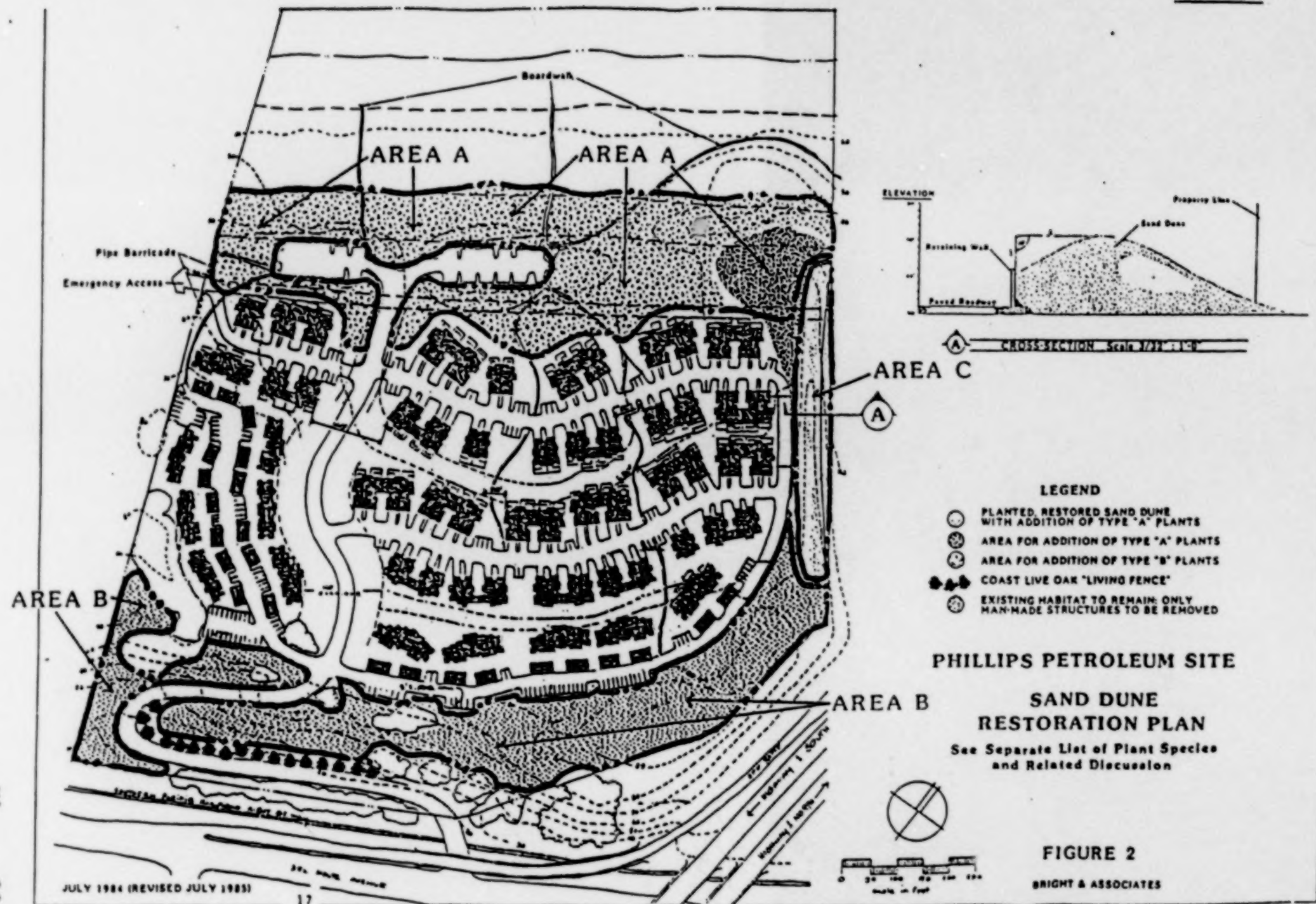
\* Listed as rare but not endangered by California Native Plant Society (CNPS)

<i>Conium maculatum</i>	Poison Hemlock	N
<i>Convolvulus soldanella</i>	Beach morning glory	N
<i>Croton californicus</i>		N
<i>Dudleya caespitosa</i>	Live-forever	N
<i>Eucalyptus</i> sp.	Eucalyptus	I
<i>Eriogonum latifolium</i>	Buckwheat	N
<i>Franseria chamissonis</i>	Beach burr	N
<i>bipinnatisecta</i>		
<i>Haplopappus ericoides</i>	Heather golden-bush	N
<i>Heterotheca grandiflora</i>	Telegraph weed	N
<i>Lotus scoparis</i>	Deerweed	N
<i>Lupinus arboreus</i>	Bush Tupine	N
<i>Lupinus chamissonis</i>	Lupine	N
<i>Lupinus</i> sp.	Lupine	N
<i>Mesembryanthemum chilense</i>	Sea-fig	I
<i>Mesembryanthemum crystallinum</i>	Ice plant	I
<i>Mesembryanthemum edule</i>	Hottentot-fig	I
<i>Oenothera cheiranthifolia</i>	Beach primrose	N
var. <i>cheiranthifolia</i>		
<i>Oenothera cheiranthifolia</i>	Beach primrose	N
var. <i>nitida</i> **		
<i>Phacelia</i> sp.		N
<i>Poa douglasii</i>	Dune Grass	N
<i>Polygonum paronychia</i>	Beach knotweed	N
<i>Pteridium aquilinum</i>	Bracken Fern	N
<i>Quercus agrifolia</i>	Coast live oak	N
<i>Rhamnus purshiana</i>		N
<i>Rubus ursinus</i>	California Blackberry	N
<i>Solanum nodiflorum</i>		I
<i>Solanum umbelliferum</i>	Nightshade	N
<i>Tetragonia expansa</i>	New Zealand Spinach	I

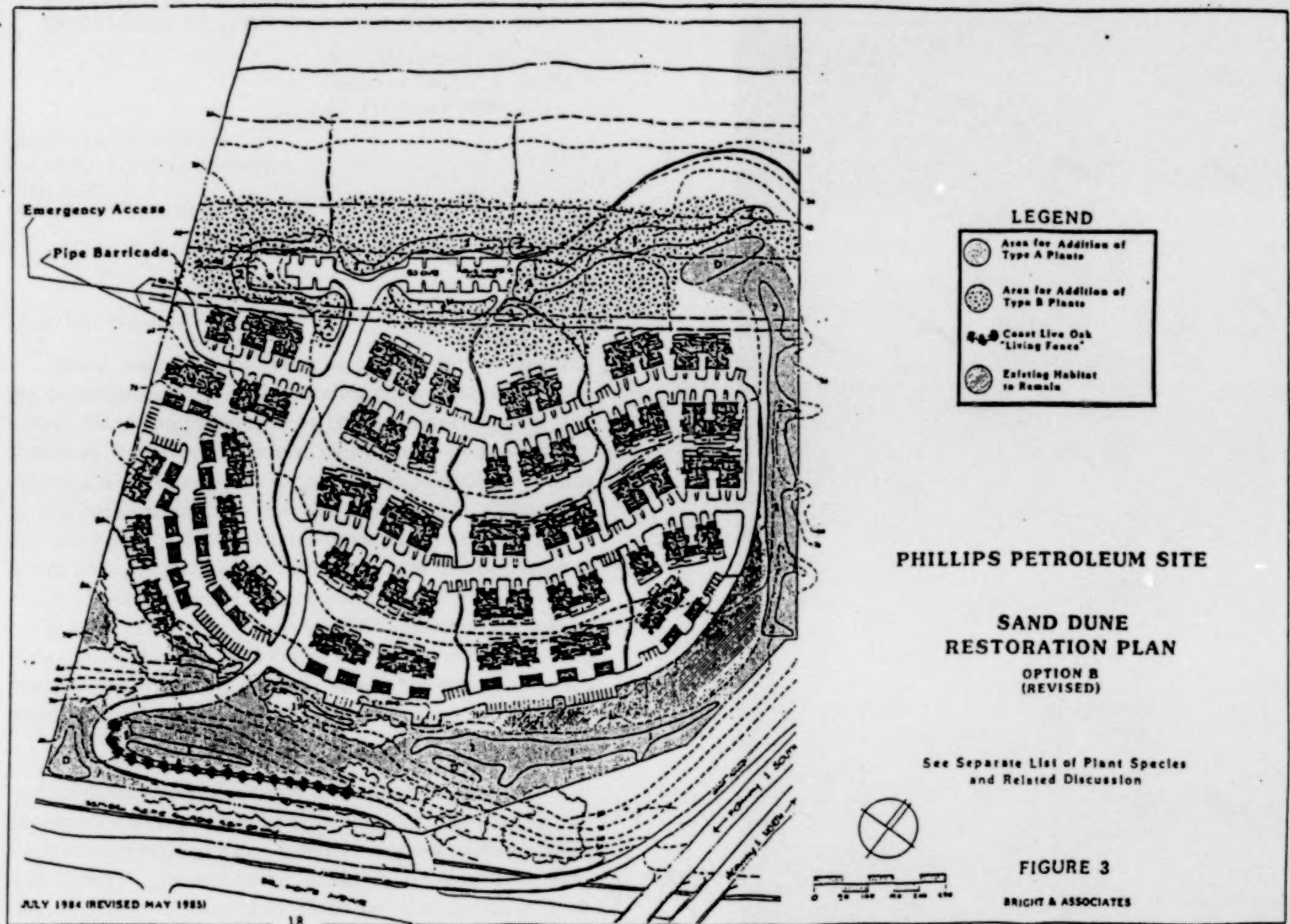
\*\* Listed as rare by Abrams but not CNPS



**VICINITY MAP****FIGURE 1**







**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**

50 Cleaveland Road #2  
Pleasant Hill, CA 94523  
23 February 1986

Mr. Hayward Norton,  
Planning Services Manager  
City Hall  
Monterey, CA 93940

RE: Habitat Restoration Plan for Monterey Bay Dunes  
Project

Dear Mr. Norton:

Thank you for your letter of 14 February requesting my comments on the latest version of the "Habitat Restoration Plan" prepared by Bright & Associates for the Monterey Bay Dunes Project. I have reviewed the documents you sent me and compared them to earlier versions of the restoration plan for the project site. Although I note that Bright & Associates have incorporated several minor changes in their revised plan, I am disappointed to still find that the plan contains serious biological flaws, as outlined in my letter to you dated 6 Sept. 1985. Because of these flaws, the plan will *not* be able to achieve its desired objective of providing suitable habitat for the endangered Smith's Blue butterfly.

For the past ten years I have studied the Smith's Blue and its habitat requirements at a number of localities in Monterey County, including the project site. During this time I have worked closely with a variety of local, state, and federal governmental agencies to resolve coastal development issues that threaten the Smith's Blue. Although I have previously met with Dr. Bright and



outlined my concerns about this project, all versions of his "Habitat Restoration Plan" have largely ignored essential biological information necessary for proper [sic] protection, management, and enhancement of Smith's Blue habitat at the project site. For example, the footprint of the current plan will destroy about 90-95% of the existing habitat that now supports the butterfly at the project site. Destruction of habitat is a violation of the "take provision" of the Endangered Species Act. Even temporary loss of nearly all the existing habitat at the project site would probably result in extinction of Smith's Blue there and further disrupt dispersal of the butterfly between other small coastal populations that occur both north and south of the project site. Thus this action will not only threaten survival of the butterfly at the project site, but also threaten its survival at other nearby sites.

The butterfly's larval foodplant, *Erogonum latifolium* or buckwheat, has been increasing in numbers and areal extent at the project site in recent years, thereby substantially improving habitat quality for Smith Blue. Buckwheat is patchily distributed at the project site, but altogether now grows on about 2 acres. The "Habitat Restoration Plan" will destroy most of these patches, and then recreate native dune habitat on approximately 10 acres. Even if all existing habitat for the butterfly were protected, longterm survival of Smith's Blue would be suspect due to the small biomass of buckwheat on site. Considering the variety of plants that will be restored in the 10 acres, it seems unlikely that the buckwheat will

cover 20% of the restored area. Thus the amount of buckwheat growing in the "restored" habitat could actually be less than what now grows at the project site.

It appears that the corridor for butterfly dispersal has been widened slightly compared to earlier versions of the plan, but it will still impair free movement of Smith's Blue to and from the project site. The access road is as wide as the average flight of most individuals and poses a barrier to dispersal. The butterfly flies close to the ground and restricts its activities to sunny areas as it is cold-blooded. Addition of the living fence of oak trees and maintenance of existing eucalyptus trees will further restrict the movement of butterflies in the corridor. The free dispersal of Smith's Blue between and among colonies along this portion of the coast is essential for maintaining this endangered species as most colonies between Monterey and Ft. Ord are fairly small [sic] size and unable to sustain themselves without recruitment of new individuals.

To conclude, the project site serves as a crucial link in a chain of small, scattered Smith's Blue populations along the Del Monte Beach coastal zone. Bright's "Habitat Restoration Plan" will not only destroy nearly all habitat on the project site that presently sustains the butterfly, but will also probably extirpate the endangered butterfly's population now resident at the project site and further threaten its survival at nearby localities. The amount of protected habitat left at the project site, while additional dune habitat is "restored", will be inadequate to sustain the Smith's Blue for the several year period (perhaps 7-10 years) required to successfully restore the site. In the interim, Smith's blues will also find the project site to be

unacceptable as a stepping-stone for their dispersal. To alleviate these problems, the footprint of the development must be substantially reduced to provide more area for protection of existing habitat for the butterfly and restoration of additional dune habitat. The corridor must be greatly expanded, preferably several hundred feet wide, and should not contain major obstructions such as oak trees, which would interfere [sic] with the butterfly's normal behavior and hinder their dispersal. By following these guidelines, adverse effects of the development on the butterfly could be minimized.

Thank you for the opportunity to submit additional comments on this matter. If you have any questions about my comments, please feel free to contact me at the above address.

Sincerely,

/s/ Richard A. Arnold

Richard A. Arnold, Ph.D.

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**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**

[SEAL]

United States  
Department of the Interior

Fish and Wildlife Service  
Lloyd 500 Building, Suite 1692  
500 N.E. Multnomah Street  
Portland, Oregon 97232

In Reply Refer To:

Your Reference:

February 24, 1986

Mr. Haywood Norton  
Planning Services Manager  
City of Monterey  
Monterey, California 93940

Dear Mr. Norton:

Thank you for your request of February 14, 1986, for our review of the habitat restoration plan for Monterey Bay Dunes. We have studied the "Summary of Restoration Activities" dated January 1986, provided with your letter as well as the "Del Monte Dunes Restoration Plan" dated February 1986 provided directly by Mr. Bright.

We are disappointed that the modifications to the project and restoration plan, suggested in our comments to the Veterans Administration on March 22, 1985, have not been adopted in these latest revisions. We emphasized to VA that the restoration plan had little chance for success given the complete destruction of presently existing habitat and the focus on marginal, currently unsuitable areas for rehabilitation. The most recent restoration concepts are little changed from the original and indicate no



increased benefit to Smith's blue butterfly in our view. Were the restoration plan a federal proposal we would not approve it, nor do we consider it consistent with our approved Recovery Plan for the species.

In our report to the Veterans Administration we noted that the endangered butterfly, along with its host plant, may be increasing its population size on the property. This has also recently been indicated in comments from Dr. Richard Arnold. Should VA request reinitiation of formal interagency consultation, we would re-evaluate whether federal loan guarantees continue to comply with the Endangered Species Act.

Sincerely yours,

/s/ William F. Shake  
William F. Shake  
Assistant Regional Director  
Federal Assistance

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**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**

**BRIGHT & ASSOCIATES**

1200 N. Jefferson, Suite B  
Anaheim, California 92807

(714) 632-8521

Telex 75-7635

Fax (714) 632-6754

March 14, 1986

Mr. Bill Wojtkowski  
Planning Director  
City of Monterey  
City Hall  
Monterey, CA 93940

Dear Mr. Wojtkowski:

Bright & Associates prepared the Restoration Plan for the proposed residential development in the Del Monte Dunes area of Monterey, California. The original Restoration Plan was prepared in July, 1984 and circulated for review. Changes have been made in the Restoration Plan (RP) due to public review and input from various agencies. The Final Restoration Plan, dated March, 1986, contains these changes. The following is a summary of the specific changes and differences between the original and final Restoration Plans.

1. The original RP suggested construction of 8-15' dunes which have been eliminated based on a recommendation from the Fish and Wildlife Service (FWS). Only one dune will be sculptured along the northeastern boundary of the property as a visual buffer to persons traveling on Highway 1. The height of this dune will be maintained per City requirements to assure that the visual barrier is maintained. No dune resculpturing will occur.

2. The use of snow fencing and jute matting were proposed in the original RP. These have been eliminated in the final RP to allow some sand migration which is desirable for efficient propagation in certain dune species.
3. The living fence of coastal live oak has been shortened to allow a potential corridor for migration of Smith's Blue Butterfly (SBB). There currently is no available corridor in this area since it is fenced, contains buildings, old tanks and mostly non-native plant species.
4. A temporary irrigation system was proposed in the original RP which has been eliminated in the final RP. Only a small amount of watering by hand will occur so that a more natural environment is created and so that the plants do not become water-dependent.
5. The type of plants to be used as part of the Restoration Plan has been expanded and may include plants which were common to the area in the past but which have since disappeared. A final plant list will be developed in consultation with the California Native Plant Society.
6. The non-native Eucalyptus trees will be removed under the proposed Final RP. They were proposed to remain under the original RP.
7. The long-term maintenance plan has been developed in more detail in the Final RP. A short-term intensive maintenance effort is proposed for at least 18 months after initial

restoration/enhancement activities begin which will include bi-weekly walkthroughs of the area by a qualified individual. The long-term maintenance program will involve a site reconnaissance on a quarterly basis to assess blow-outs, trampling, wind damage, damage to public walkways and related signs, etc. The restoration areas will be dedicated to an appropriate public agency, contingent on the restoration areas of being in good, viable condition.

8. The length of the access road has been reduced in the final RP to allow almost the entire backdune to remain in its existing condition and be enhanced by the removal of iceplant and the additional [sic] of native plants.
9. A large area along the northeastern boundary of the property was removed from development and added to the Restoration Plan area in the final RP. This area will remain in its existing state. This area (Area B, Figure 2 of the final RP) was added due to the existence of viable natural habitat and numerous buckwheat plants. Further, it may provide a potential corridor for butterfly migration between various habitats up and down the coast. This is a significant benefit to the SBB because no corridor currently exists in this area.
10. A larger area has been included for restoration activities in the Final RP in front of the proposed parking area than in the original RP.
11. The access alternative has been determined by the City so the discussion on access



alternatives has been eliminated in the Final RP.

There are two additional general changes reflected in the Final Restoration Plan: (1) The Final Plan incorporates City requirements regarding view vistas, location of primary access, balanced cut and fill and so forth, and the fact that the City Council already established the number of allowed units; and (2) the content of the March 22 1985 letter from Bill Shake, Fish and Wildlife Service to Virgle Cockrum, Veterans Administration indicating that if the proposed project proceeds it "is not likely to jeopardize the continued existence of the Smith's Blue Butterfly" and that losses of Smith's Blue Butterflies "will be small and of little consequence to the species as a whole if the project is constructed."

Considering the above, we believe that the responses to the comments from all the agencies have been incorporated to the extent feasible in the Final Restoration Plan.

Please call if you have any questions or comments.

Sincerely,

BRIGHT & ASSOCIATES

/s/ Debra Bright/for  
Donald B. Bright

DBB:DAB:vc

cc: D. Spence  
P. Davis

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

31 March 1986  
50 Cleaveland Rd. #3  
Pleasant Hill, CA 94523

Mr. Haywood Horton  
Planning Services Manager  
City Hall  
Monterey, CA 93940

RE: Habitat Restoration Plan for Monterey Bay Dunes  
Project

Dear Mr. Norton:

Thank you for your recent request for additional comments on the Habitat Restoration Plan (HRP) prepared by Bright & Associates for the Monterey Bay Dunes Project. I recently received a copy of the Final HRP from Bright & Associates.

I have carefully reviewed the Final HRP and compared its contents to earlier versions. As in my reviews of earlier versions, I noted several minor changes in the Final HRP. However, the Final HRP still does *not* properly address any of the biological issues raised in my letters dated 6 Sept. 1985 and 23 Feb. 1986. Since essential information relevant for proper conservation and management of the endangered Smith's Blue butterfly is being ignored, the Final HRP will *not* be able to achieve its desired short- and long-term objectives. Furthermore, the Final HRP, in its present form, will establish a bad precedent for resolving similar land-use conflicts where the endangered butterfly's habitat occurs in the greater Monterey area. As I

stated in my earlier letters, if the footprint of the development was substantially reduced to provide more area for protection of existing habitat and restoration of additional habitat at the project site, then we could better mitigate the adverse effects of the proposed development on the butterfly.

Thank you for the opportunity to provide additional comments on this matter.

Sincerely,

/s/ Richard A. Arnold  
Richard A. Arnold

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**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**

[LOGO] United States  
Department of the Interior

Fish and Wildlife Service  
Lloyd 500 Building, Suite 1692  
500 N.E. Multnomah Street  
Portland, Oregon 97232

In Reply Refer To:

Your Reference:

April 2, 1986

Mr. Haywood Norton  
Planning Services Manager  
City of Monterey  
Monterey, California 93940

Dear Mr. Norton:

This confirms the telephone conversation you had with Mr. Wayne White of my staff on March 25, 1986, regarding our February 24, 1986 letter to you. As stated to you during the telephone conversation, please disregard our February 24, 1986 letter. This letter will constitute our comments on your request of February 14, 1986, for our review of the habitat restoration plan for Monterey Bay Dunes.

In reviewing the plan we noted no significant change in the overall project relative to our authorities and review under Section 7 of the Endangered Species Act. As such, the conclusion stated in our Biological Opinion of March 22, 1985 to the Veterans Administration are unchanged. The project as proposed is not likely to jeopardize the



continued existence of the endangered Smith's blue butterfly. Our incidental take measures and conditions also stand as previously stated.

Sincerely,

/s/ William F. Shake  
William F. Shake  
Assistant Regional Director  
Federal Assistance

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**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**

STATE OF CALIFORNIA-THE RESOURCES AGENCY  
GEORGE DEUKMEJIAN, Governor

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DEPARTMENT OF FISH AND GAME [LOGO]  
POST OFFICE BOX 47  
ILLEGIBLE, CALIFORNIA 94599  
ILLEGIBLE44-2011

April 18, 1986

Mr. Haywood Norton  
Planning Services Manager  
City of Monterey  
Monterey, CA 93940

Dear Mr. Norton:

This letter is in regard to the Restoration Plan for the Monterey Bay Dunes area. We have reviewed the April 2, 1986 letter from the U.S. Fish and Wildlife Service to you and we concur with the Service's findings and recommendations.

Sincerely,

/s/ Brian Hunter  
Brian Hunter  
Regional Manager  
Region 3

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)

[LOGO] United States  
Department of the Interior

Fish and Wildlife Service  
Lloyd 500 Building, Suite 1692  
500 N.E. Multnomah Street  
Portland, Oregon 97232

In Reply Refer To:

Your Reference:

May 5, 1986

Ms. Joyce Stevens  
Coastal Committee  
Sierra Club  
P.O. Box 5667  
Carmel, California 93921

Dear Ms. Stevens:

Thank you for your letter of April 25, 1986, and accompanying map overlay of the Phillips site and Del Monte Dunes housing.

You are correct that we continue to endorse our position as stated in our Biological Opinion to Veterans Administration (attached). That Opinion was prepared with a full awareness of Dr. Arnold's views and several letters over the last few years. The City of Monterey has a copy of that Opinion and we hope it will not be mis-construed as approval of the project or the restoration plan. Our position has been clearly stated - the project will destroy most, if not all, of the Smith's blue butterflies (SBB) and their host plants on the site (p. 6), and the final restoration plan will not likely succeed in replacing lost habitat or preserving SBB at that location (p. 10).

Some dichotomy exists regarding our responsibilities under the Endangered Species Act and our review of this project. Section 7 of the ESA requires us to decide whether a federal action (VA home loan guarantees/loans) is likely to jeopardize the continued existence of a listed species (SBB). This involves a determination of whether the chances for *both* survival and recovery of the species in the wild (not just the Phillips site) will be appreciably reduced by the proposed federal action. Given the admittedly limited biological information on the SBB at the Phillips site in 1985, and the existence of numerous other colonies (see attached Recovery Plan), we could not rationally conclude that the entire species would be jeopardized by this action. However, we did emphasize that this site, identified as necessary for recovery and eventual delisting of the species, would be irretrievably lost. This, however, is not sufficient to invoke the prohibitions of Section 7.

To respond to an important point you raised, our Opinion considered the value of the site as a "corridor" for SBB dispersal (p. 9). While recognizing the existence of about 1000 host plants, we emphasized that the importance of the site as a corridor was speculative. Our Recovery Plan states only that this site "may" be critical, but is nevertheless unequivocal that the site should be preserved as a element of recovery.

Our Opinion also suggested modifications to the project design that we think appropriate to preserve SBB and its habitat on the site. With these modifications, a restoration plan along the lines of that proposed could probably



succeed since it would build on preservation and enhancement of existing SBB habitat. We hope local government will consider these suggestions in light of their own responsibilities to conserve endangered species.

Sincerely yours,

/s/ William F. Shake  
William F. Shake  
Assistant Regional Director  
Federal Assistance

Enclosures

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**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA (S.F.)**  
STATE OF CALIFORNIA--THE RESOURCES AGENCY  
GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF FISH AND GAME [LOGO]  
POST OFFICE BOX 47  
ILLEGIBLE, CALIFORNIA 94599  
ILLEGIBLE44-2011

June 3, 1986

Mr. Haywood Norton  
Planning Services Manager  
City of Monterey  
Monterey, CA 93940

SUBJECT: Del Monte Dunes of Monterey Project

Dear Mr. Norton:

This letter responds to your recent request to Mr. Elliott in our Monterey office for a clarification of the Department's views on the subject project.

The Department continues to be committed to the protection of the Smith's blue butterfly and the preservation of its habitat. We regard the occurrence of either adult or larval forms of the butterfly on a site with the host buckwheat plants as an indication of viable habitat worthy of species protection. We concur with the City of Monterey's Planning Commission Conditions of Approval for the project wherein it states that "... the developer shall preserve the existing habitat" and in the habitat protection policies in the Del Monte LUP wherein specific mention of the Smith's blue butterfly is clearly stated in Environmentally Sensitive Habitat Areas Policy 3, quoted as follows: "3. All environmentally sensitive habitat shall be protected". Our point in re-stating the

latter is that while we are aware that the same section goes on to mandate that revegetation with wild buckwheat "shall be" included as part of the dune restoration program for any development to enhance habitat for the Smith's blue butterfly, both the LUP and the City of Monterey Planning Commission Conditions of Approval also clearly state a definite requirement for protection of the *existing* habitat.

The Department believes that the reference material submitted by the Sierra Club at the recent May 6 meeting in Monterey accurately and objectively illustrates the precise location of buckwheat species on the project site. The overlay accompanying this material clearly demonstrates those areas most appropriate for any building construction which would avoid the critical habitat areas defined by City and LUP policy as mandated for complete protection.

Sincerely,

/s/ Brian Hunter  
Brian Hunter  
Regional Manager  
Region 3

BH:dcm

## ATTACHMENT A

### BACKGROUND SUMMARY

#### HABITAT RESTORATION PLAN DEL MONTE DUNES OF MONTEREY PROJECT

A Habitat Restoration Plan for the Del Monte Dunes of Monterey Project has been prepared in response to Conditions 3 and 4 of the City of Monterey Planning Commission's Conditions of Approval for the project. Conditions 3 and 4 read as follows:

3. *SMITH'S BLUE BUTTERFLY*: Prior to final map or any construction, whichever occurs first, the developer shall preserve the existing habitat, in line with habitat protection policies in the Del Monte Beach Land Use Plan. The habitat preservation shall be reviewed by California Department of Fish and Game and U.S. Fish and Wildlife Service and the City of Monterey. Any significant changes to the site plan as a result of that review will require an approval by the City of Monterey and may require resubmittal of Tentative Map.
4. *RARE AND ENDANGERED PLANTS*: All rare and endangered plants shall be preserved in line with the habitat protection policies in the Del Monte Beach Land Use Plan. The rare and endangered plant preservation program shall be reviewed by the California Native Plant [sic] Society, and approved by the City of Monterey.

The habitat protection policies in the Del Monte Beach LUP are listed in Attachment C. Specific mention of the Smith's Blue Butterfly is made in Environmentally Sensitive Habitat Areas Policy 3 in the LUP, and is as follows:

3. All environmentally sensitive habitat shall be protected. Revegetation with wild buckwheat



(*Eriogonum latifolium* or *Eriogonum parvifolium*) shall be included as part of the dune restoration program for any new development to enhance habitat for the Smith's Blue Butterfly.

Attachment B presents, in chronological order, correspondence addressing the Habitat Restoration Plan. The Habitat Restoration Plan has been reviewed by the California Department of Fish and Game and the U.S. Fish and Wildlife Service. Fish and Wildlife's most recent response is in the letter dated April 2, 1986 (in Attachment B) and Fish and Game's response is in the letter dated April 18, 1986 (in Attachment B). Fish and Game's letter states that it agrees with Fish and Wildlife's letter.

The April 2, 1986 letter from the U.S. Fish and Wildlife Service signed by Assistant Regional Director William Shake states that, under Section 7 of the Endangered Species Act, the Del Monte Dunes of Monterey Project will not jeopardize the continued existence of the endangered Smith's Blue Butterfly. As indicated in a March 26, 1986 memo (in Attachment B), Section 7 of the Endangered Species Act is limited to consideration of the species as a whole and not on a site-by-site basis. In letters in Attachment B dated March 22, 1986 and February 24, 1986 from Fish and Wildlife, statements are made that the Monterey illegible Dunes project, as sited, and the Habitat Restoration Plan, as proposed, could have little chance of success in providing for the continued existence of

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**DELMONTE DUNES AT MONTEREY, LTD., AND  
MONTEREY-DEL MONTE DUNES CORPORATION v.  
CITY OF MONTEREY**

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

PAUL DAVIS-DIRECT\JACOBSEN

[p. 88] THERE'S SOMEWHERE AROUND 12 TO 18 INCHES OF OIL-SOAKED SAND THAT WAS THERE, AND NOTHING WAS GROWING IN THAT AREA, AS WELL AS A LOT OF PIPES THAT CONNECTED THESE TANKS TOGETHER UNDERNEATH, SOME OF THEM STICKING UP BECAUSE WHEN THEY PULLED SOME OUT, THEY LEFT OTHERS.

BASICALLY, IT'S A LEFT OVER SITE FROM THE ORIGINAL TANK FARM. BUT A LOT OF THE DEBRIS WAS STILL THERE. CHUNKS OF CONCRETE IN PLACES, OLD PIECES OF PIPE OF DIFFERENT SIZE THAT WAS ON THE SITE.

Q. LET ME GO BACK TO 158-C AND ALSO I HAVE 158-A IN FRONT OF ME NOW. THERE IS IN THE LOWER PORTION ON THE HIGHWAY HERE SOME - A SMALL BUILDING, AND IT LOOKS LIKE SOME TANKS APPEAR.

IS THAT PART OF THE SUBJECT PROPERTY?

A. YES.

Q. THERE'S SOME REFERENCE TO FACILITIES YARD THAT WE WILL SEE IN THE DOCUMENTS.

WHAT IS THIS AREA OF THE SUBJECT PROPERTY DOWN HERE?

A. THAT WAS ORIGINALLY AN AREA WHERE THERE WAS LOADING AND OFFLOADING, APPARENTLY WHERE TRUCKS CAME IN AND LOADED UP WITH GAS OR OIL AND WENT TO THEIR DESTINATION. IT WAS BASICALLY WHERE THAT WAS DONE.

THERE ARE SOME TANKS HERE, SOME OUT-BUILDINGS, A WAREHOUSE, SOME PAVING, AND IT HAS DIRECT ACCESS OFF OF DEL MONTE BOULEVARD.

\* \* \*

[p. 91] Q. WE HAVE HEARD REFERENCE IN THE OPENING STATEMENTS TO CITY REGULATIONS, SUCH AS GENERAL PLAN AND ZONING THAT GOVERN PROPERTY. AT THE TIME YOU WERE RETAINED IN 1981 BY PHILIPS - BY PONDEROSA - WAS THE SUBJECT PROPERTY GOVERNED BY VARIOUS CITY GENERAL PLAN AND ZONING AND OTHER LAND USE REGULATIONS?

A. YES.

Q. DID THOSE REGULATIONS SPECIFY THE MAXIMUM DENSITY THAT COULD BE DEVELOPED ON THE SUBJECT PROPERTY?

A. YES.

Q. WHAT WAS THAT MAXIMUM DENSITY AS OF 1981?

A. THAT DENSITY WAS AN R-4 ZONING WHICH ALLOWED A DENSITY OF 29 UNITS PER ACRE. SO TAKING 29 UNITS TIMES THIRTY-SEVEN AND A HALF ACRES IS SOMEWHERE IN EXCESS OF 900

UNITS THAT WOULD BE POSSIBLE UNDER THE ZONING.

\* \* \*

[p. 93] Q. WE WILL GET INTO THIS AS WE GET TO SOME OF THE PLANS, BUT WHEN YOU WERE PREPARING THESE VARIOUS PROPOSALS FOR THE CITY, WOULD YOU ACTUALLY GO TO THE CITY PLANNING STAFF AND ASK THEM WHAT THEY THOUGHT ABOUT VARIOUS MATTERS?

A. YES.

Q. DID YOU DO THAT WITH SOME FREQUENCY? IF THE CITY PLANNING STAFF, AFTER YOU PRESENTED SOMETHING TO THEM, SAID, "WE WOULD LIKE YOU TO CHANGE IT AND DO IT A DIFFERENT WAY," WOULD YOU FOLLOW THE STAFF'S RECOMMENDATION?

A. YES.

Q. WITHOUT EXCEPTION?

A. I DON'T REMEMBER AN EXCEPTION THAT WE DIDN'T FOLLOW THE CITY ENTIRELY. WE WORKED WITH THE CITY AND THEIR CONCERNS.

\* \* \*

[p. 97] WAS THERE GOING TO BE PUBLIC ACCESS TO THE BEACH UNDER THIS 344-UNIT PROPOSAL?

A. YES. THERE WAS TO BE ALLOWED PUBLIC ACCESS TO THE BEACH DOWN THROUGH HERE AND PARKING HERE. AND THEN BECAUSE OF THE FACT THAT WE WOULD PLANT THIS IN NATIVE



BEACH VEGETATION AND SO IT WOULDN'T BE DISTURBED, THERE WOULD BE WALKS, BOARDWALKS, THAT WOULD GO THROUGH THAT TO ROUTE PEOPLE THROUGH THE NATURAL PLANTED AREA.

Q. SO EFFECTIVELY, TO KEEP THEM OFF THE GRASS?

A. YES, THAT'S RIGHT, OFF THE PLANTS.

Q. THERE IS A PARKING LOT SHOWN HERE.

WAS THAT GOING TO BE FOR THE BENEFIT OF THE RESIDENTS OR PUBLIC?

\* \* \*

[p. 106] Q. LET ME, IF I MIGHT, REFER YOU, MR. DAVIS, TO EXHIBITS 9 AND 10, WHICH FOR THE RECORD EXHIBIT 9 IS A SEPTEMBER 20, 1982 LETTER TO MR. DAVIS FROM THE CITY OF MONTEREY FIRE PREVENTION MANAGER AND SEPTEMBER 30, 1982, MEMO TO THE CITY MANAGER FROM THE COMMUNITY DEVELOPMENT DIRECTOR.

IS THAT THE PLANNING DIRECTOR, MR. DAVIS?

A. YES.

Q. DO YOU RECOGNIZE THOSE EXHIBITS?

A. YES.

Q. JUST FOR THE JURY'S INFORMATION, DO THOSE CITY DOCUMENTS INVOLVE ACCESS TO THE PROPERTY?

A. YES.

Q. BOTH OF THEM DO?

A. YES, THEY DO.

Q. THEY ARE BOTH ROUGHLY - ONE IS IN SEPTEMBER '82 - BOTH IN SEPTEMBER OF 1982?

A. THAT'S RIGHT.

Q. EVEN BEFORE YOU CAME UP FOR YOUR FIRST REVIEW, THEN, WAS THE CITY TALKING TO YOU ABOUT ACCESS THOUGH THIS PROPERTY IN TERMS OF DEVELOPMENT?

\* \* \*

[p. 120] Q. DID YOU, IN REDUCING THE DENSITY FROM 344 TO 264, DID YOU DO THAT AFTER CONSULTATION WITH CITY OFFICIALS?

A. YES, VERY MUCH SO. WHERE THE EXISTING DENSITY OF THE LAND WAS ALLOWED AT 29 UNITS PER ACRE, THERE WAS A CONSENSUS OF OPINION THAT SEVEN UNITS PER ACRE WOULD BE A BETTER RATIO.

Q. CONSENSUS AMONG CITY REPRESENTATIVES?

A. A CONSENSUS AMONG THE CITY REPRESENTATIVES, THE ELECTED OFFICIALS, AND IN FACT THAT BECAME THE WRITTEN IN DENSITY ALLOWED IN THE LOCAL COASTAL PLAN, THAT SEVEN UNITS PER ACRE WAS THE AGREED UPON DENSITY IN THAT AREA. IN OTHER WORDS, IT SHOULD BE CHANGED FROM 29 DOWN TO SEVEN UNITS PER ACRE AND SEVEN UNITS PER ACRE EQUATED OUT TO 264 UNITS.

Q. YOU HAVE UNDER LAND CATEGORY 37.6 ACRES. THAT IS THE SIZE OF THE ENTIRE PARCEL?

A. YES.

Q. THEN 7.0 UNITS PER AC?

A. PER ACRE.

Q. AND THE 264 MULTIPLIES THIRTY-SEVEN AND A HALF TIMES SEVEN?

A. THAT'S CORRECT.

\* \* \*

[p. 125] Q. LET ME GO BACK TO YOUR 264 HERE. WE HAVE KIND OF GONE THROUGH THIS ON THE 344.

DID IT STILL PROVIDE FOR PUBLIC ACCESS TO THE BEACH?

A. YES. IF YOU CAN SEE ON THE RIGHT SIDE, WE HAD A DRIVE THAT WENT DOWN THE PROPERTY LINE WITH A CUL-DE-SAC AT THE END AND WITH PUBLIC PARKING THERE.

Q. THE PARKING LOT HERE IS ON THE BORDER IT SHARES WITH THE STATE PARK?

A. YES.

Q. SO THAT HAD AT LEAST BEEN MOVED FROM YOUR OTHER?

A. THAT'S RIGHT. I MIGHT SAY, TOO, THAT WE WERE IN CONTINUAL DISCUSSION THERE WITH WHERE WOULD BE THE BEST PLACE TO LOCATE

THAT, ON THE SIDE OF THE PROPERTY, MIDDLE OF THE PROPERTY, AND THERE WAS CHANGING ATTITUDES ON THAT. AND WE WERE - AT THAT TIME APPARENTLY IT WAS FELT IT SHOULD BE ADJACENT TO STATE PARKS.

Q. IT WAS FELT BY WHOM?

A. I'D SAY PROBABLY A COMBINATION OF CITY AND COASTAL COMMISSION STAFF.

I MIGHT MENTION THAT DURING THESE LOCAL COASTAL PLAN MEETINGS WITH THE CITY, EVEN THOUGH THE CITY HELD IT, THERE WERE ALWAYS COASTAL COMMISSION STAFF THERE FOR INPUT OF HOW THEY SAW THE COASTAL ACT BEING INTERPRETED IN MONTEREY'S PLAN.

\* \* \*

[p. 130] Q. DID YOU APPEAL THAT DENIAL?

A. YES.

Q. DID YOU COME BEFORE THE CITY COUNCIL IN APPROXIMATELY JANUARY OF 1984?

A. YES.

Q. WHAT HAPPENED AT THAT HEARING, TO YOUR RECOLLECTION, IN JANUARY OF 1984?

A. AS I REMEMBER, WE WERE TOLD THAT WE SHOULD MAKE SOME MODIFICATIONS. ONE WAS, I BELIEVE, PULLING BACK BEHIND THE SEWER LINE EASEMENT AND NOT HAVING ANY DEVELOPMENT



ON THE OCEAN SIDE OF THE SEWER LINE EASEMENT AND TO LOWER OUR NUMBER DOWN TO ABOUT 225.

\* \* \*

[p. 138] Q. 150 TO 190?

A. YES. BUT THEY ACTUALLY SAID COME BACK TO THE PLANNING COMMISSION AT 190 UNITS.

Q. THAT IS WHAT THE COUNCIL SAID WAS 190?

A. YES, 190.

Q. DID YOU GO BACK AT THAT POINT, THEN, AND REDESIGN THIS PROJECT ONCE AGAIN FOR 190 RESIDENTIAL UNITS?

A. YES. I MIGHT ADD THAT THE COUNCIL ALSO AMPLIFIED UPON THIS AND SAID THAT GOING FROM 224 TO 190 REPRESENTED A 15-PERCENT REDUCTION, AND THEY WANTED A CORRESPONDING 15-PERCENT REDUCTION IN SQUARE FOOTAGE. THEY DIDN'T WANT US [p. 140] TO HAVE JUST FEWER BIGGER UNITS, BUT THEY WANTED THE SIZE, OVERALL SQUARE FOOTAGE, TO BE CUT PROPORTIONATELY. SO THERE WAS SOME GUIDANCE TO HOW THIS 190 UNITS SHOULD BE APPORTIONED ON THE SITE.

Q. SO GOING FROM - WHEN THE COUNCIL WENT FROM 224 TO 190, THEY DID THAT BY MEANS OF A MATHEMATICAL FORMULA OF A 15-PERCENT REDUCTION?

A. YES.

Q. BUT THEY WANTED 15 PERCENT REDUCED IN FLOOR AREA OR SQUARE FOOTAGE?

A. FLOOR AREA, WHICH IS SQUARE FOOTAGE.

\* \* \*

[p. 145] Q. YOU HAVE TAKEN THE ROAD AWAY FROM THE STATE PARKS SIDE, BUT YOU HAVE ALSO TAKEN ANY ACCESS OR PARKING OFF THERE.

DID THE COASTAL COMMISSION STAFF REQUEST YOU TO DO THAT, TOO?

A. YES. THEY FINAL [sic] DECIDED THAT WOULD BE TOO DAMAGING TO THE PROPERTY. NOT NATURE TERRAIN. IT WOULD BE BETTER TO KEEP THIS NATURE BLUFF HERE, NATURAL BLUFF HERE AND HAVE ONE ACCESS, INCREASE THE PARKING HERE. WE HAVE 50 PARKING SPACES AND HAVE THIS BE THE MAIN AREA. THAT IS WHY WE CAME UP WITH THIS WIDENED ROAD COMING IN.

SO YOU REALLY HAD A SENSE THAT YOU WERE COMING INTO AND GOING THROUGH KIND OF AN OPEN SPACE AREA AND THIS BE KIND OF A GENEROUS CORRIDOR LEADING DOWN WITH A FULL VIEW OF THE OCEAN. SO IT WOULD BE VERY DRAMATIC SO THAT YOU INCREASE THIS WHOLE EXPERIENCE OF PUBLIC ACCESS AND MAXIMIZE IT.

Q. IN PREVIOUS PROPOSALS YOUR ENTRYWAY WAS NARROWER THAN IN THE 190, CORRECT?

A. YES.

Q. WHO ASKED YOU - WHOSE IDEA WAS IT TO WIDEN THIS ACCESS SO THAT PEOPLE WOULD GET

A MORE OPEN SPACE FEEL AS THEY WENT THROUGH THE PROPERTY?

A. IT WAS KIND OF IN BETWEEN THE PLANNING COMMISSION AND THE [p. 146] ARCHITECTURAL REVIEW COMMITTEE. WE WERE WORKING WITH BOTH. WE HAD STUDY SESSIONS WITH THE PLANNING COMMISSION, AND I DON'T REMEMBER WHETHER THE IDEA STARTED WITH THEM. IT PROBABLY DID START WITH THEM. AND IT WAS SORT OF CARRIED OUT IN TERMS OF HOW WIDE THAT SHOULD BE BY GOING THROUGH THE ARCHITECTURAL REVIEW COMMITTEE.

\* \* \*

Q. WE HAVE INDICATED BEFORE THE STATE PARK OWNS THE LAND OVER TO THE EAST AWAY FROM TOWN BORDERING THIS PROPERTY, CORRECT?

A. YES.

Q. IN DISCUSSING THIS PROPOSAL, 190 UNITS, WITH THE COASTAL COMMISSION STAFF AND THE CITY OF MONTEREY REPRESENTATIVES, WAS THERE ANY CONSIDERATION GIVEN TO THE RELATIONSHIP BETWEEN THE STATE PARK LAND AND WHAT YOU WERE PROPOSING HERE?

A. WELL, BECAUSE OF THE FACT THAT THEY WERE STILL IN THEIR PLANNING PROCESS AND DIDN'T KNOW EXACTLY WHAT THEY WERE GOING TO DO, THAT WE WOULD STAY AS FAR AWAY AS

POSSIBLE JUST TO PROVIDE A BUFFER. SO WHATEVER THEY DID OVER HERE THERE WOULD BE KIND OF THIS BUFFER AREA.

THAT'S WHY WE HAVE THIS FAIRLY SIGNIFICANT SETBACK IN THIS EASTERN BOUNDARY THAT IS ALL PART OF THIS GENERAL OPEN SPACE AREA.

\* \* \*

[p. 151] Q. YOU MENTIONED EARLIER THAT AMONG OTHER THINGS THE CITY POLICIES AND REGULATIONS WERE CONCERNED WITH PUBLIC USE OF THE BEACH AND ACCESS AND THE LIKE.

WERE THERE ALSO PUBLIC POLICIES BY THE CITY OF MONTEREY CONCERNING VISUAL ASPECTS OF THIS PROJECT?

A. YES.

Q. CAN YOU DESCRIBE FOR THE JURY IN GENERAL WHAT THOSE WERE?

A. THERE WAS LIMITATION IN TERMS OF HEIGHT OF BUILDINGS. AND I REMEMBER, I BELIEVE, THEY HAD TO STAY TWO STORY, 25 FEET MAXIMUM HEIGHT. THEY HAD TO BE POSITIONED IN THE BOWL SO THEY WOULD NOT BE SEEN EITHER FROM HIGHWAY 1 OR DEL MONTE BOULEVARD.

SO IN ESSENCE, WE HAD TO MAKE SURE THAT WE LOWERED OR THAT THE BOWL WAS LOW ENOUGH AND BASICALLY TERRACED AS WE SITED THOSE VARIOUS ROWS MOVING DOWN THE BOWL TO LOCATE THE UNITS SO THEY WOULD NOT BE



SEEN. THEY WOULD BE SHIELDED OR SCREENED VISUALLY FROM THE DUNE AT THE TOP TO THE SOUTH OR TO THE TOP OF THE DUNE TO THE EAST.

THERE WAS SOME CONSIDERATION THAT WE MAY HAVE TO DO SOME EXTRA MOUNDING ON THE TOP OF THAT DUNE TO SUPPLEMENT [p. 152] THAT. THAT WAS ALLOWED. BUT IT WAS THAT WE HAD TO WORK OUT WITH THE ARCHITECTURAL REVIEW COMMITTEE TO MAKE SURE WE SATISFIED THAT REQUIREMENT.

Q. AFTER COMPLYING WITH THESE CITY POLICIES THAT REQUIRED THIS BEACH FRONT AND NOT BUILDING SEAWARD, THE SEWER EASEMENT, AND STAYING AWAY FROM STATE PARKS AND THE HABITAT AND THAT, HOW MUCH FLEXIBILITY WAS THERE IN TERMS OF WHERE YOU COULD PUT THE UNITS?

A. NOT A LOT, BECAUSE WE WERE REALLY LIMITED IN TERMS OF FOOTPRINT AREA BECAUSE OF THOSE CONSTRAINTS AND THE FACT WE HAD TO PROVIDE FOR PARKING, STREET ACCESS. BESIDES THE PUBLIC ACCESS PARKING, WE HAD TO PROVIDE FOR PARKING REQUIREMENT OF THE CITY IN TERMS OF THE UNITS, GUEST PARKING FOR THOSE PEOPLE, REASONABLE STREET DIMENSIONS AND ACCESS FOR IN AND OUT IN TERMS OF PARKING MANEUVERING, REASONABLE SETBACKS BETWEEN BUILDINGS. THOSE VIEW CORRIDORS.

SO THERE WAS A LOT OF CONSTRAINTS THAT WE HAD TO WORK WITH, AND WE WERE WORKING

BETWEEN THE PLANNING COMMISSION AND THE ARCHITECTURAL REVIEW COMMITTEE.

Q. THE JURY HAS SEEN THESE PICTURES WHERE YOU CAN SEE THE IMPRINT OF THESE OLD TANK SITES.

A. YES.

Q. IS MOST OR ALL OF THIS ACTUAL DEVELOPABLE [sic] AREA, AS YOU CALL IT, IN THE BOWL WHERE THOSE TANK SITES WERE?

A. YES.

[p. 153] Q. YOU DIDN'T GO OUTSIDE THAT AREA?

A. NO. THAT'S ONE OF THE THINGS THIS PLAN CAME DOWN TO - BASICALLY KEEPING THE DEVELOPMENT WHERE THE SITE HAD ALREADY BEEN DISTURBED AND THEN ALLOW SOME WHERE THE SITE HADN'T BEEN DISTURBED BE THE OPEN SPACE. OF COURSE, WHERE THAT EXISTING ROAD GOES AROUND THE PERIMETER, THAT WOULD BE RESTORED DISTURBED AREA.

Q. THIS HABITAT AREA HAD BEEN DISTURBED BY PHILIPS PETROLEUM AND THE TANK FARM?

A. THE ACCESS ROAD, YES.

Q. AS WELL AS ITS EXISTING ROAD?

A. YES.

Q. WERE YOU PROPOSING TO TEAR OUT THAT ROAD THAT EXISTS TO THIS DAY?

A. YES, AND TO RESTORE THAT TO NATURAL HABITAT.

Q. WE WILL HAVE DOCTOR BRIGHT HERE, BUT IF YOU COULD, WHEN YOU WERE TALKING ABOUT RESTORATION, WHAT KIND OF THINGS DID YOU HAVE IN MIND?

A. THAT IS BASICALLY CREATING A PLANTED AREA THAT WOULD BE PLANTED WITH THE PLANT, WHICH IS THE BUCKWHEAT, AND THERE ARE TWO TYPES OF BUCKWHEAT, THE FEMALE AND THE MALE. AND I'M NOT EXPERT TO DEFINE WHAT THAT MEANS, BUT THAT IS THE HABITAT WHERE THE SMITH'S BLUE BUTTERFLY HATCHES AND BASICALLY WHERE THEY LIVE.

AND THERE'S THIS HABITAT KIND OF SCATTERED ALONG THE [p. 154] MONTEREY BAY ALL THE WAY FROM THIS SITE A LITTLE FARTHER SOUTH FROM THIS SITE ALL THE WAY UP TO SAND CITY, FORT ORD, MARINA, ALL THE WAY TO THE SALINAS RIVER.

SO THERE IS A LOT OF THIS HABITAT AREA THAT THE SMITH'S BLUE BUTTERFLY HAS. BASICALLY, BY RESTORATION, IT WOULD BE REGRADING AND REPLANTING, AND IN REPLANTING IT HAS TO BE DONE FROM THE SEEDS THEMSELVES.

AS I REMEMBER, AND DOCTOR BRIGHT CAN ELABORATE, BUT CHEVRON DID THIS IN DUNES BY

THE AIRPORT IN LOS ANGELES. IT'S THE SAME CONCEPT OF CREATING NATURAL HABITAT FOR THE SMITH'S BLUE BUTTERFLY.

Q. YOU USED THE EXPRESSION THAT WHERE THE TANKS FARMS WERE, IT WAS DISTURBED.

WHEN YOU SAY THE LAND WAS DISTURBED, WHAT EXACTLY DO YOU MEAN?

A. WELL, SOMETIME IN THE PAST IT PROBABLY HAD BEEN NICE UNDULATING SAND DUNES, AND THIS HAD ALL BE GRADED OUT AND THERE WERE BASICALLY PADS BUILT AND PIPES RUN BETWEEN TANKS AND PIPES RUN ALL OVER THE PLACE BETWEEN TANKS.

THEN WHEN THESE TANKS WERE PULLED OUT, THERE WERE STILL THE OIL STAINED PADS WHERE THEY SAT, CONCRETE CHUNKS IN THE ROAD AND AMONG THESE TANKS. IT WAS ABOUT AS DISTURBED AS YOU CAN DISTURB A NATURAL SAND DUNE AREA.

\* \* \*

[p. 159] Q. HOW LONG DID IT TAKE TO GET TO THE ARCHITECTURAL REVIEW COMMITTEE AND GET A DECISION FROM THEM ON YOUR 190-UNIT PROPOSAL HERE?

A. WELL, BECAUSE OF THE COMPLEXITY OF THE PROJECT, I BELIEVE WE SAT DOWN WITH CITY STAFF AND DECIDED HOW THIS WOULD BE DONE.

ITEM NUMBER B IN NUMBER 1 ALSO HAS THE CONDITION THAT THE PLANNING COMMISSION. IT



SAYS THE PLANNING COMMISSION SHALL EVALUATE AND DETERMINE WHETHER ADDITIONAL PUBLIC PARKING SHOULD BE PROVIDED, ALSO HOW THAT SHOULD BE LOCATED, WHAT THAT RIGHT-OF-WAY SHOULD LIKE [sic] LOOK LIKE IN TERMS OF WIDENING THAT ROAD THAT WE TALKED ABOUT OR HOW THAT PRIVATE ACCESS SHOULD BE.

AND IN C IT SAYS ALSO THAT THE PLANNING COMMISSION NEEDED TO REVIEW HOW WE CUT THAT 15 PERCENT SQUARE FOOTAGE OUT OF THE PROJECT.

IN D, THAT THEY SHOULD EVALUATE THE ALIGNMENT OF U-CORRIDORS IN ORDER TO INCREASE THE VIEW POTENTIAL. IT WAS FELT WE SHOULD HAVE SOME MEETINGS WITH THE PLANNING COMMISSION FIRST BECAUSE THESE WERE ITEMS THAT COULD EFFECT SOME OF THE ARCHITECTURAL CONSIDERATIONS OF THE REVIEW BOARD SO AS NOT TO GET AHEAD ONE FROM THE OTHER.

SO WE HAD - I DON'T REMEMBER, BUT I KNOW WE HAD TWO, THREE FOUR MEETINGS. WE HAD FIELD TRIPS WITH THE [p. 160] PLANNING COMMISSION TO GET THEIR INPUT INTO THAT. AND THEY MADE CERTAIN RECOMMENDATIONS, THE ARCHITECTURAL REVIEW BOARD, ON WHO [sic] HOW TO EVALUATE THOSE ISSUES.

IN ADDITION TO THAT, THE CITY DECIDED THEY SHOULD HIRE AN INDEPENDENT ARCHITECT

IN MONTEREY TO MAKE AN INDEPENDENT CRITIQUE OF THE PROJECT AND HAVE HIS RECOMMENDATIONS TO THE ARCHITECTURAL REVIEW COMMITTEE TO HELP IN EVALUATION OF THIS.

SO THERE WAS ANOTHER ARCHITECT THAT WENT THROUGH AND WROTE A SEVERAL PAGE CRITIQUE OF WHERE HE FELT THIS SETBACK SHOULD BE WIDENED, THIS SHOULD BE SHIFTED. LOTS OF LITTLE DETAIL ITEMS.

SO WHAT WE DID IS WE MASSAGED OUR PLAN TO RESPOND TO ALL OF THOSE GUIDELINES, BOTH WHAT THE PLANNING COMMISSION HAD DECIDED, WHAT THE ARCHITECT HAD RECOMMENDED, AND THEN MET WITH THE ARCHITECTURAL REVIEW COMMITTEE ON SEVERAL MEETINGS GOING OVER DETAIL BY DETAIL.

WE HAVE STACKS OF DRAWINGS THIS THICK OF FLOOR PLANS AND ALL THE EXTERIOR ELEVATIONS OF ALL THOSE BUILDINGS SHOWING BALCONIES AND RAILINGS AND HOW IT WAS GOING TO BE BROKEN UP, HOW THE UNITS WERE GOING TO LOOK.

WE HAD BROUGHT IN A LANDSCAPE ARCHITECT THAT DID A CONCEPTUAL LANDSCAPE PLAN. THEY WANTED CROSS-SECTIONS THROUGH RETAINING WALLS, WALKS, EVERYTHING IN TERMS OF HOW WE WERE GOING TO TREAT THIS AREA. I BELIEVE EVEN HOW THE BOARDWALK [p. 161] WAS GOING TO BE BUILT IN TERMS OF GOING DOWN TO THE BEACH.

Q. OVER THE SAND DUNES?

A. OVER THE SAND DUNE AREA. SO THIS TOOK THE GREATER PART OF A YEAR BETWEEN THE PLANNING COMMISSION HEARINGS AND ARCHITECTURAL REVIEW MEETINGS.

THEY ULTIMATELY MENTIONED PUTTING POLICIES ON THE PROPERTY, HAVING A SURVEY - SURVEY THE ACTUAL EXISTING ELEVATION AT THE TOP OF THE BLUFF SO THAT THEN WE COULD TAKE CALTRANS MAPS AND GET THE GRADES AND PLOT WHAT WOULD BE ANGLES OF VIEW ACROSS THE PROPERTY IF YOU'RE SITTING IN A CAR YOUR EYES FOUR FEET OFF THE PAVEMENT. ALL THOSE CONSIDERATIONS. SO THAT WAS ALL PART OF THE PROCESS.

THEN THE ARCHITECTURAL REVIEW COMMITTEE FINALLY APPROVED THE SCHEMATIC ARCHITECTURAL DESIGN.

\* \* \*

[p. 164] Q. REFERRING TO CONDITION 1-A, THAT WAS THE ARCHITECTURAL REVIEW COMMISSION, DID THAT - I HAVE ASKED YOU ABOUT AND YOU DESCRIBED YESTERDAY FOR THE JURY WHAT YOU WENT THROUGH AND THE LENGTH OF TIME AND THE STACK OF DRAWINGS.

DID YOU ULTIMATELY GET APPROVAL FROM THE ARCHITECTURAL REVIEW COMMITTEE OF THE CITY OF MONTEREY IN TERMS OF THE TYPES OF HOUSES YOU WERE PROPOSING AND THE FLOOR

PLANS AND ALL THOSE OTHER MATTERS THAT YOU DESCRIBED?

A. YES, WE DID.

Q. THEREFORE, HAD YOU SATISFIED THIS CONDITION?

A. YES.

Q. REFERRING TO CONDITION 1-B, THAT'S A REFERENCE TO THE EVALUATION OF WHETHER ADDITIONAL PUBLIC PARKING SHOULD BE PROVIDED.

DO YOU SEE THAT?

A. YES, I DO.

Q. DID YOU FURTHER INVESTIGATE OR ANALYZE THAT IN SATISFACTION OF THAT CONDITION?

A. YES. THAT WAS DETERMINED BY THE PLANNING COMMISSION AT A STUDY SESSION WHAT THEY FELT SHOULD BE PROVIDED IN TERMS OF PUBLIC PARKING, AND THAT WAS INCORPORATED INTO OUR PLANS, AND IT WAS APPROVED.

[p. 165] Q. AGREED UPON?

A. AGREED UPON.

Q. THAT CONDITION SATISFIED?

A. YES.

Q. AGAIN, CONDITIONS 1-C AND 1 - LET'S TALK ABOUT 1-C. YOU REFERRED EARLIER IN YOUR



TESTIMONY THAT THE CITY COUNCIL HAD WANTED A 15-PERCENT REDUCTION FROM 220 TO 190 UNITS. THIS CONDITION SPEAKS TO THE SQUARE FOOTAGE ASPECT OF THAT.

DID YOU FURTHER ANALYZE AND HAVE DISCUSSIONS WITH THE CITY CONCERNING THAT CONDITION?

A. YES, WE DID. AND WE SUBMITTED TO THE CITY A DETAILED BREAKDOWN OF HOW WE WERE REDUCING THE FLOOR AREA BY A 15-PERCENT REDUCTION. AND THIS REQUIRED A CERTAIN ANALYSIS, BECAUSE IN SOME CASES WE WERE GOING FROM BUILDINGS WITH OUTSIDE STAIRS AND BALCONIES TO TOWNHOUSES WITH INTERIOR STAIRS. SO THE COMBINATION OF HOW WE CALCULATED IT.

BUT WE DID GET THAT TO THE CITY, AND THEY AGREED WITH OUR ANALYSIS, AND I DON'T REMEMBER ANY PROBLEM WITH WHAT WE HAD PRESENTED. BASICALLY, IT WAS APPROVED TO SATISFY THAT CONDITION.

Q. CONDITION 1-D TALKS ABOUT ALIGNMENT OF VIEW CORRIDORS AND INCREASING THE VIEW POTENTIAL.

DID YOU, AFTER SEPTEMBER OF '84, DO FURTHER INVESTIGATION AND ANALYSIS AND WORK CONCERNING THAT CONDITION?

A. YES, WE DID, AND THAT WAS, AGAIN, BOTH WITH THE PLANNING [p. 166] COMMISSION AND WITH THE ARCHITECTURAL REVIEW, ANALYZING

THE WIDTH OF THE VIEW CORRIDORS, AND WE DID CROSS-SECTIONS TO SHOW WHAT THOSE CORRIDORS WOULD LOOK LIKE.

Q. YOU HAD DESCRIBED YESTERDAY HOW YOU PUT THE POLES UP WITH THE FLAGS AND TOOK VARIOUS MEASUREMENTS.

WAS THAT TO SATISFY THIS CONDITION?

A. THIS CONDITION WAS MORE VIEW CORRIDORS WITHIN THE SITE SO THAT YOU COULD BE ON THE UPPER PART OF THE SITE AND LOOK DOWN THROUGH SPACES BETWEEN BUILDINGS AND SEE THE WATER BASICALLY. AND ALSO THE VIEW CORRIDOR COMING DOWN THE MAIN ENTRANCE ROAD AND ITS ADEQUACY TO PROVIDE A VIEW CORRIDOR OR VIEW PERSPECTIVE OF THE OCEAN.

Q. AND TO PURSUE THIS CONDITION, DID THAT REQUIRE VARIOUS ARCHITECTURAL RENDERINGS AND DISCUSSION SESSIONS AND MEETINGS WITH CITY OFFICIALS?

A. YES.

Q. HOW MANY, IF YOU RECALL?

A. I DON'T REMEMBER THE PARTICULAR NUMBER, BUT I WOULD SAY THERE WERE A COUPLE, AT LEAST, WITH THE PLANNING COMMISSION AND A COUPLE WITH THE ARCHITECTURAL REVIEW COMMITTEE. THERE MAY HAVE BEEN MORE.

I REMEMBER DOING SOME DETAIL PLANS JUST OF THE CORRIDORS THEMSELVES AND THE SPACE

BETWEEN THE BUILDINGS AND ANALYZING THAT. AND THEN THEY WOULD MAKE SOME COMMENTS AND WE WOULD GO BACK AND MAKE CHANGES AND THEN COME BACK. SO THERE [p. 167] WERE MEETINGS WHERE WE WERE WORKING WITH THEIRS [sic] CONCERNS.

Q. CONDITION 2 REFERS TO SUBMITTAL OF SUFFICIENT DETAILED PLANS FOR CONCEPT REVIEW AND APPROVAL BY THE ARCHITECTURAL REVIEW COMMITTEE.

AS PART OF WHAT YOU WERE DESCRIBING, DID YOU SATISFY THIS CONDITION BY SUBMITTING THOSE SUFFICIENT DETAILS FOR THE ARCHITECTURAL REVIEW COMMITTEE?

A. YES, WE DID. AND WE GOT APPROVAL FROM THE ARCHITECTURAL REVIEW COMMITTEE.

Q. CONDITION 3, THAT IS ENTITLED "SMITH'S BLUE BUTTERFLY." LET ME, IF I MIGHT, COME BACK TO THAT.

LET ME ASK YOU ABOUT CONDITION 4. THAT'S REFERENCED TO "RARE AND ENDANGERED PLANTS" AND REFERS TO THAT:

"THESE PLANTS SHALL BE PROTECTED IN LINE WITH PROTECTION POLICIES OF THE DEL MONTE DUNE LAND USE PLAN AND SHALL BE REVIEWED BY THE NATIVE PLANT SOCIETY."

CAN YOU EXPLAIN TO THE JURY WHAT YOU UNDERTOOK TO SATISFY CONDITION NUMBER 4?

A. THAT WAS SATISFIED BY WORKING WITH MR. BRIGHT, WHO WAS THE CONSULTANT WHO BASICALLY PREPARED THE RESTORATION PLAN AND INCORPORATING HIS RECOMMENDATION IN OUR PLAN IN TERMS OF WIDTH OF RESTORATION AREA WHERE WE LOCATED OUR DEVELOPMENT, AND THAT WAS ALL SUBMITTED FOR REVIEW AND WAS PART OF THE OVERALL REVIEW PROCESS.

[p. 168] Q. WAS THAT SATISFACTORY TO THE CITY IN TERMS OF PROTECTION OF THESE RARE AND ENDANGERED PLANTS?

A. YES.

Q. LET ME ASK SOMETHING ELSE BEFORE I GO ON TO SOME OF THESE OTHER ONES; ONCE GOT [sic] THIS APPROVAL IN SEPTEMBER OF 1984, HOW LONG DID IT TAKE YOU AND THE OTHER TEAM MEMBERS REPRESENTING THE OWNER OR APPLICANT TO DO ALL THIS WORK WITH THE ARCHITECTURAL REVIEW COMMITTEE AND THESE NATIVE PLANTS AND THE LIKE?

A. IT TOOK OVER A YEAR. IT TOOK ABOUT 15 - 14, 15 MONTHS, BECAUSE BASICALLY IT TOOK TO THE END OF '84 AND ALL OF '85, AND IT WASN'T UNTIL EARLY '86 THAT WE WERE READY TO GO BACK TO THE PLANNING COMMISSION.

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[p. 181] Q. I KNOW DOCTOR BRIGHT WILL BE TESTIFYING. I DON'T WANT TO GO INTO THE NATURE OF THOSE DIFFERENT PLANS. I WOULD LIKE TO ASK GENERALLY, BEFORE THE SEPTEMBER



1984 APPROVAL OF THE 190 UNITS IN THE BOWL HERE, WAS THE CITY AWARE THAT THERE WAS THIS HABITAT OUT THERE AND THE POTENTIAL OF THESE BUTTERFLIES OUT THERE?

A. YES, THE CITY WAS AWARE AS WELL. IN FACT, THE EIR WAS DONE. I DON'T REMEMBER TO WHAT DETAIL THE EIR IN '82 OR '81 LOOKED INTO THE - LOOKED INTO THE SMITH'S BLUE BUTTERFLY AND ITS ENVIRONMENTAL IMPACT POTENTIAL, BUT THERE WAS LATER AN EIR SUPPLEMENTAL DONE BY THE SAME CONSULTANT THAT SPECIFICALLY LOOKED AT THE BUTTERFLY HABITAT AND BASICALLY CAME TO THE CONCLUSION THAT THERE WAS NO SIGNIFICANT IMPACT OF WHAT WE WERE PROPOSING. AND THIS WAS FOR THE 344 PLAN ON THE HABITAT OF THE SMITH'S BLUE BUTTERFLY.

Q. THERE'S REFERENCE IN THIS CONDITION TO HABITAT PRESERVATION.

WOULD THAT BE ANOTHER WAY OF SAYING RESTORATION [p. 182] PLAN?

A. YES.

Q. THAT'S WHAT WAS GOING TO BE REVIEWED BY THESE OTHER AGENCIES?

A. CORRECT.

Q. LET ME ASK YOU, GOING BACK TO THE 190 UNITS AND THE LOCATION IN WHICH THE CITY APPROVED IT IN SEPTEMBER OF 1984, BEFORE THIS SEPTEMBER '84 APPROVAL, HAD DOCTOR BRIGHT

OR OTHERS - AND OTHERS, ANALYZED WHERE THE BUTTERFLY HABITAT WAS ON THE PROPERTY?

A. YES.

Q. SO WHEN YOU WERE DESIGNING THIS SUBDIVISION, YOU KNEW ROUGHLY WHERE THAT HABITAT WAS, CORRECT?

A. CORRECT.

Q. AND BY HABITAT -

CAN YOU TELL ME WHAT YOU UNDERSTAND OR WHAT YOU UNDERSTOOD BY BUTTERFLY HABITAT? WHAT IS IT?

A. BASICALLY, THE LOCATION OF SOME OF THESE PLANTS, THE BUCKWHEAT PLANT AND THE TWO SPECIES, THE MALE AND THE FEMALE SPECIES, AND I DON'T REMEMBER THE SCIENTIFIC NAME, BUT - THAT ARE LOCATED ON THE SITE. NOT IN ANY GREAT NUMBER. NOT IN ANY GREAT CONCENTRATION. KIND OF SPRINKLED AROUND THESE OIL SOAKED PADS, BUT THEY WERE THERE AND EVERYBODY WAS AWARE THEY WERE THERE.

Q. THE PLANTS?

[p. 183] A. THE PLANTS, YEAH. UP UNTIL THAT TIME, THERE WAS NO - THERE WASN'T A BUTTERFLY LOCATED, BUT THE PLANTS WERE THERE.

AS I MENTIONED, THE PLANTS, IN MY UNDERSTANDING, ARE NOT ENDANGERED THEMSELVES AND ARE IN FACT UP AND DOWN THE COAST OF CALIFORNIA. SO THERE'S NOTHING UNIQUE ABOUT THE PLANT ITSELF.

Q. LET'S TALK ABOUT THE LOCATION OF THE PLANT. BEFORE YOU DESIGNED THE 190-UNIT PROPOSAL HERE AFTER THESE SEVERAL YEARS, YOU DESCRIBED YESTERDAY OF INPUT FROM VARIOUS AGENCIES.

DID YOU HAVE FROM DOCTOR BRIGHT AND OTHERS THE LOCATION OF WHERE THESE BUCKWHEAT PLANTS WERE? CAN YOU JUST DESCRIBE FOR THE JURY GENERALLY WHERE THOSE PLANTS WERE LOCATED?

A. GENERALLY, IN THE EASTERN CORNER OF THE PROPERTY AND GOING INTO THE AREA WHERE THE BUILDINGS ARE SHOWN, A LITTLE BIT ON THE EASTERN CORNER OF THE PROPERTY.

Q. WHERE I'M INDICATING WITH MY FINGER HERE (INDICATING)?

A. YES. A LITTLE BIT UP INTO THAT AREA AS WELL. BUT TO MY UNDERSTANDING, IT WAS - THE GREATEST POTENTIAL LOCATION OF THE HABITAT FOR THE BUTTERFLY WAS ON THE BACK DUNE WHERE IT COULD BE PROTECTED FROM THE WIND BECAUSE OF BEING ON THE BACK SIDE OF THE DUNE; THAT THERE WAS LESS LIKELY TO BE BUTTERFLIES SPOTTED DOWN IN THE BOWL OR WHERE THESE OTHER PLANTS WERE BECAUSE THAT'S WHERE THE HARSHER WEATHER WAS LOCATED. AND THE MOST VALUABLE RESTORATION PLAN WAS ON THE BACK SIDE OF THE [p. 184] DUNE WHERE WE BASICALLY ENDED UP DOING OUR RESTORATION PLAN.

Q. IN YOUR PLAN, DID YOU MAKE SURE THAT HOUSING UNITS WERE KEPT OUT OF THAT BACK DUNE AREA?

A. YES.

Q. DID YOU, WHEN YOU DESIGNED THIS 190-UNIT PROPOSAL AFTER SEVERAL YEARS OF THESE MEETINGS WITH THE CITY AND OTHER AGENCIES, DID YOU KNOW THERE WERE SOME BUCKWHEAT PLANTS IN THE AREA YOU PREPARED FOR HOMES?

A. YES.

Q. DID THE CITY KNOW THAT?

A. TO MY - AS I REMEMBER, THERE WAS NO - EVERYBODY KNEW WE HAD IT. WE HAD HAD FIELD TRIPS OUT ON THE SITE.

Q. SO AT THE TIME OF THE APPROVAL IN 1990 - LET ME STRIKE THAT AND ASK IT A DIFFERENT WAY.

YOU WERE SAYING YOU HAD HAD A LOT OF MEETINGS BEFORE THE SEPTEMBER '84 APPROVAL WITH VARIOUS CITY OFFICIALS, AND DOCTOR BRIGHT WAS WORKING ON SOME THINGS.

DID DOCTOR BRIGHT, IN TERMS OF THIS STUDY HE PREPARED BEFORE THIS APPROVAL, DID HE TRANSMIT THOSE TO THE CITY?

A. YES.

Q. AND THEY SHOWED WHERE THE - THE FACT THERE WAS SOME BUCKWHEAT WHERE YOU HAD PROPOSED HOUSES?



A. YES.

Q. AT THE TIME OF THE APPROVAL, DID THE CITY KNOW THAT SOME [p. 185] OF THESE HOUSES WERE GOING TO BE BUILT WHERE THE BUCKWHEAT WAS?

A. YES.

Q. YOU MENTIONED EARLIER -

CAN YOU DESCRIBE FOR THE JURY THIS AREA WHERE THESE BUCKWHEAT PLANTS ARE FOUND? WHERE WAS THE RELATIONSHIP OF THE BUCKWHEAT PLANTS TO THE SITE?

A. MAY I COME DOWN?

Q. CERTAINLY.

A. AS WE MENTIONED YESTERDAY, THIS IS BASICALLY THE BOWL. AND THESE PADS OCCUR IN DIFFERENT CONFIGURATIONS. THERE WERE TWO OR THREE ROWS OF KINDS OF THESE PADS.

WELL, IN BETWEEN SOME OF THESE PADS THERE WOULD BE LITTLE CLUSTERS OF A FEW PLANTS. NOT A LARGE CLUSTER, BECAUSE IT WASN'T A LARGE AREA. BUT THEY WOULD BE THERE AMONG THE PIPE AND CHUNKS OF CONCRETE AND EVERYTHING THAT SOME OF THESE PLANTS WOULD BE GROWING.

IN SOME PLACES THERE WAS ICE PLANT THERE. IN SOME PLACES THEY WERE TAKING OVER. SO IT WAS IN BETWEEN THESE OIL SOAKED PADS THERE WERE LITTLE SPOTS OF BUCKWHEAT PLANT LOCATED.

Q. SO TO THE EXTENT THAT THERE'S REFERENCE TO HABITAT IN YOUR BUILDING AREA, THE REFERENCE IS TO THESE PLANTS HERE AND THERE?

A. YES.

[p. 186] Q. HOW BIG ARE THESE BUCKWHEAT PLANTS?

A. MY MEMORY IS THEY ARE NOT MORE THAN 12, 18 INCHES MAYBE IN DIAMETER, AND HEIGHT MAYBE 24.

DON BRIGHT CAN CERTAINLY ANSWER THAT BETTER THAN I CAN. THEY ARE NOT MUCH BIGGER THAN THAT. THEY ARE A SMALL, SCRAGGLY LOOKING PLANT - TO ME.

Q. LET ME FOCUS NOW ON THE WORDS IN CONDITION 3 THAT THE CITY REQUIRED YOU TO PROTECT THE EXISTING HABITAT.

DO YOU SEE THAT?

A. YES.

Q. HAD YOU HAD DISCUSSIONS WITH THE CITY CONCERNING THE PHRASING OF THAT CONDITION PREVIOUS TO THE APPROVAL? YES. THAT REALLY GOES BACK TO THE HISTORY OF THE LOCAL COASTAL PLAN. WHEN WE WERE WORKING WITH THE CITY IN '82-'83 ON THE LOCAL COASTAL PLAN, PART OF THE LOCAL COASTAL PLAN WAS CITY POLICIES ON PROTECTING HABITAT.

IT WAS UNDERSTOOD AT THAT TIME THAT THE WORD "PROTECT" DID NOT MEAN PROTECT EVERY

SINGLE PLANT THAT EXISTED ON A PIECE OF PROPERTY, BUT PROTECT THE FACT THAT THE HABITAT IS THERE AND THAT COULD BE DONE BY KEEPING SOME OF THE EXISTING PLANTS AS WELL AS DOING A RESTORATION PLAN AND ALLOWING FOR AN INCREASED AREA IN A LOCATION THAT COULD BE BETTER IN TERMS OF A HABITAT, IN TERMS OF ITS REAL VALUE RATHER THAN KIND OF SPREAD OUT PIECEMEAL OVER THE PROPERTY.

Q. DID YOU DISCUSS WITH CITY OFFICIALS THIS CONCERN OF YOURS [p. 187] THAT THE NOTION OF PRESERVING AN EXISTING HABITAT NOT BE MISINTERPRETED TO MEAN YOU COULDN'T BUILD OVER A PARTICULAR PIECE OF BUCKWHEAT?

A. YES.

Q. LET ME SHOW YOU EXHIBIT 71.

DO YOU RECOGNIZE EXHIBIT 71, MR. DAVIS?

A. YES.

Q. DID THE CITY PROVIDE YOU WITH A COPY OF THAT IN SEPTEMBER 1984?

A. YES.

Q. THIS IS A DOCUMENT FROM THE SENIOR PLANNER, MR. NORTON.

DO YOU KNOW WHO HE WAS?

A. YES.

Q. WHO WAS HE?

A. HE WAS THE SENIOR PLANNER THAT AT THAT TIME WAS HANDLING THE LOCAL COASTAL

PLAN PROCESS. HE WAS BASICALLY DOING THE WRITING OF IT, HANDLING ALL OF THE APPROVAL PROCESS WITH THE COASTAL COMMISSION, AND HE WAS THE MAIN PLANNER IN TERMS OF THE LOCAL COASTAL PLAN. SO WE WERE WORKING TOGETHER ON THESE POLICIES.

Q. HE'S DIRECTING THIS TO THE COMMUNITY DEVELOPMENT DIRECTOR.

IS THAT THE HEAD OF THE PLANNING DEPARTMENT?

A. YES.

WHO WAS THAT INDIVIDUAL AT THE TIME, IF YOU RECALL?

A. MR. BILL WOJTKOWSKI.

[p. 188] Q. THIS SEPTEMBER '84 MEMORANDUM IS RIGHT BEFORE THE APPROVAL OF YOUR 190-UNIT PLAN, ISN'T IT?

A. YES.

Q. HERE MR. NORTON, ON BEHALF OF THE CITY, CONCLUDES THAT YOUR SCHEME D, EXHIBIT 83-A, ADHERES TO ALL POLICIES IN THE DEL MONTE BEACH LUP WITH ONE EXCEPTION. WHAT IS THE LUP?

A. THAT IS THE LAND USE PLAN. THE LAND USE PLAN IS PART OF THE LOCAL COASTAL PLAN IN THAT IT'S A BASIC LAND USE PLAN WHICH SHOWS WHERE DIFFERENT USES CAN BE LOCATED AND POLICIES ON HOW THOSE USES SHALL BE DEVELOPED WITHIN THE COASTAL PLAN.



Q. DID MR. NORTON ADVISE YOU JUST BEFORE THIS SEPTEMBER '84 APPROVAL THAT IN FACT YOUR 190-UNIT SCHEME COMPLIED OR ADHERED TO ALL THE POLICIES IN THE LAND USE PLAN FOR THE MONTEREY - CITY OF MONTEREY?

A. YES. AND WHAT HE POINTS OUT HERE AT ONE TIME WE DID SHOW SOME PRIVATE YARDS FROM SOME OF THOSE UNITS THAT ARE ON THE - THAT ARE CLOSEST TO THE OCEAN INFRINGING OVER THAT SEWER EASEMENT.

YOU SEE THAT DOUBLE LINE. THAT IS THE SEWER EASEMENT. WE HAD ALL THE BUILDINGS BACK, BUT WE HAD SOME YARDS THAT KIND OF WENT OUT OVER THAT. AND THE INTERPRETATION OF STAFF WAS THAT EVEN THE PRIVATE YARDS NEEDED TO BE BACK OF THAT LINE.

SO WE MADE THOSE ADJUSTMENTS, THEN, AS PART OF OUR ONGOING ADJUSTING THE PLAN AFTER THAT. BUT THIS IS WHAT HE IS [p. 189] REFERRING TO, THAT EVEN THE PRIVATE YARDS SHOULD BE IN BACK OF THAT LINE.

Q. WITH THE ONE EXCEPTION OF THESE YARDS ENCROACHING, THE PLANNING DEPARTMENT OF THE CITY OF MONTEREY TOLD YOU YOU ADHERED TO EVERYTHING ELSE IN THIS LUP?

A. YES.

\* \* \*

[p. 211] Q. HAD ANYONE FROM THE CITY ADVISED YOU AT ANY TIME AT ANY OF YOUR PREVIOUS PROPOSALS, INCLUDING THE 190 LOT SITE PLAN APPROVED IN SEPTEMBER '84, WOULD SUBSTANTIALLY INJURE THE HABITAT OF THE SMITH'S BLUE BUTTERFLY?

A. NO.

Q. WAS THAT DOCTOR BRIGHT'S CONCLUSION THAT IT WOULD SUBSTANTIALLY DAMAGE THE HABITAT OF THE SMITH'S BLUE BUTTERFLY?

A. NO.

Q. NUMBER 5 SAYS "THE PROJECT AS SUBMITTED IS NOT IN CONFORMANCE WITH THE GENERAL PLAN."

IS IT THE MONTEREY GENERAL PLAN THEY ARE TALKING ABOUT?

A. I ASSUME SO, YES.

Q. I ASKED YOU AT THE BEGINNING OF YOUR TESTIMONY YESTERDAY IN YOUR QUALIFICATIONS IF YOU KNEW THE MONTEREY GENERAL PLAN, ZONING AND THE LIKE.

ARE YOU FAMILIAR, IN 25 YEARS OF PRACTICING DOWN THERE, ABOUT THE CONDITIONS, POLICIES, RULES, REGULATIONS IN THE MONTEREY GENERAL PLAN?

A. YES, IN GENERAL, AND I'M VERY AWARE OF THE GENERAL PLAN AND HAVE ACCESS - HAVE A COPY OF THE GENERAL PLAN. SO I REFER TO IT IN

ITS VARIOUS POLICIES, AS WE DID AT THE START OF [p. 212] THIS PROJECT BACK IN '81.

THAT WAS PART OF OUR JOB WAS TO MAKE SURE THAT WE WERE DOING A PROJECT FOR PONDEROSA HOMES AT THAT TIME WITHIN THE GENERAL PLAN, WITHIN THE ZONING LAWS OF THE CITY OF MONTEREY. AND IN FACT, IN '82 THE ENVIRONMENTAL IMPACT REPORT - PART OF ITS JOB IS TO ANALYZE THE GENERAL PLAN AND LIST THE POLICIES OF THE GENERAL PLAN THAT APPLY TO A PARTICULAR DEVELOPMENT AND THEN ANALYZE WHETHER THIS DEVELOPMENT HAS AN IMPACT ON THOSE POLICIES OR NOT. AND THAT WAS DONE CONTINUOUSLY THROUGH THE ENVIRONMENTAL IMPACT REPORT AND ONGOING AS WE WENT THROUGH THIS PROJECT.

Q. LET ME FOLLOW UP ON THAT. THIS JURY HAS HEARD EVIDENCE NOW WHERE YOU WENT FROM 344 TO 264 TO 224 TO 190.

EVERY TIME THAT THE COUNCIL DIRECTED YOU TO GO BACK AND CHANGE IT, WOULD YOU THEN BE COMING BACK TO THE PLANNING STAFF TO OBTAIN DETERMINATIONS AS TO CONSISTENCY WITH THE MONTEREY GENERAL PLAN, OR CONFORMITY, I SHOULD SAY?

A. I THINK IT WAS GENERALLY ASSUMED BECAUSE WE WERE MAKING THE PROJECT SMALLER THAT IT WAS NOT GOING TO PRODUCE ANY GREATER IMPACT. THE SMALLER PROJECT WOULDN'T CREATE ANY GREATER IMPACT THAN THE LARGER PROJECT.

BUT AT THE LATER STAGES, I BELIEVE, WHEN WE CAME IN WITH THE 190-UNIT PLAN, THERE WAS ANOTHER ENVIRONMENTAL IMPACT EVALUATION MADE BY STAFF. IN FACT, THERE WAS, UP UNTIL EITHER LATE '85 OR CERTAINLY '86, AN EVALUATION DONE THAT AGAIN WENT [P. 213] BACK AND COMPARED THE PROJECT WITH THE ENVIRONMENTAL IMPACT REPORT FOR THE 244. IT CAME TO THE SAME CONCLUSION: THERE ARE NO SIGNIFICANT IMPACTS.

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[p. 215] Q. YOU SAID THERE WAS DISCUSSION, AND THE EFFECT OF THIS WAS TO FORCE YOU INTO OPEN SPACE.

ARE YOU AWARE, HAVING BEEN IN THE MONTEREY AREA AS A PRACTICING PROFESSIONAL PLANNER AND ARCHITECT FOR THE LAST 25 YEARS OR SO, ARE YOU AWARE OF, EITHER JUST DURING THIS TIME PERIOD '81 OR '85 OR SHORTLY BEFORE IT, OF ANY OFFICIAL ADOPTED POLICY BY THE CITY OF MONTEREY CONCERNING OPEN SPACE ON THE SUBJECT PROPERTY, THIS PHILIPS PROPERTY HERE?

A. AS I REMEMBER IN THE 70S, LATE 70S -

MR. YUHAS: I DON'T MEAN TO INTERRUPT THE WITNESS, BUT THIS IS TOUCHING ON AN AREA THE COURT HAS RULED ON.

THE COURT: I DID ON DOCUMENTS, BUT I'M NOT GOING TO PRECLUDE THE WITNESS'S TESTIMONY. THE OBJECTION IS OVERRULED. THE WITNESS MAY TESTIFY.



THE WITNESS: IN THE 1970S THE CITY DID DEVELOP A REDEVELOPMENT PLAN FOR THE BEACHFRONT PROPERTY FROM THE WHARF OUT TO WHAT WAS THEN THE HOLIDAY INN WITH THE INTENT AND THE POLICY TO PRESERVE ALL THE OCEANFRONT PROPERTY THAT HAD NOT BEEN DEVELOPED.

Q. PRESERVE IT IN OPEN SPACE?

A. YES, PRESERVE IT IN OPEN SPACE. AND THERE WAS ALSO THEN EFFORTS TO OBTAIN MONEY TO BE ABLE TO BUY THIS LAND IN OPEN [p. 216] SPACE. AND, IN FACT, THE STATE DID PURCHASE THE PROPERTY ADJACENT TO THIS WHICH WE HAVE IDENTIFIED AS STATE PARKS PROPERTY. THAT WAS PURCHASED IN THE LATE 70S, EARLY 80S, AND THERE WAS DISAPPOINTMENT AT THAT POINT THAT THE STATE HAD NOT PURCHASED ALL THE PROPERTY, INCLUDING PHILIPS PETROLEUM, AND HAD BASICALLY SELECTED THE ONE PARCEL AND NOT THE WHOLE PARCEL TOGETHER.

SO THERE WAS ALWAYS THIS EARLY INTENT THAT THIS SHOULD BE OPEN SPACE AND THE ATTEMPTS BY THE CITY TO OBTAIN MONEY TO BUY THIS AS OPEN SPACE.

Q. LET ME ASK THIS BECAUSE I ASKED YOU ABOUT OFFICIALLY ADOPTED POLICIES OF THE CITY. WHEN YOU REFER TO THIS REDEVELOPMENT AGENCY, WAS THAT A CITY REDEVELOPMENT AGENCY OR THE STATE OF CALIFORNIA REDEVELOPMENT AGENCY?

A. THAT WAS THE CITY'S.

Q. WAS THAT REDEVELOPMENT AGENCY OFFICIALLY ADOPTED BY THE CITY?

A. YES.

Q. AFTER PUBLIC HEARINGS AND THE LIKE?

A. YES.

Q. YOU MENTIONED THAT AS PART OF THIS REDEVELOPMENT AGENCY THERE WAS A POLICY TO ACQUIRE THE PHILIPS PROPERTY.

UNDER THE REDEVELOPMENT AGENCY OFFICIALLY ADOPTED BY MONTEREY, WHO IS GOING TO ACQUIRE THAT PROPERTY?

A. WELL, IT WOULD HAVE TO BE MONTEREY OR SOME ENTITY THAT [p. 217] THEY WOULD BRING IN, LIKE STATE PARKS OR COASTAL CONSERVANCY, OR SOME AGENCY. BUT THE CITY WOULD HAVE TO TAKE THE LEAD IN IT.

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[p. 232] DAVIS-CROSS/YUHAS

Q. THE JOB OF THE COASTAL COMMISSION IS TO ENFORCE THE POLICIES OF THE COASTAL ACT?

A. YES.

Q. AND THERE ARE A NUMBER OF THOSE POLICIES THAT WERE RELEVANT TO THIS PARTICULAR PROPERTY, CORRECT?

A. YES.

[p. 233] Q. NOW, ONE OF THOSE POLICIES DEALS WITH SHORELINE ACCESS, DOES IT NOT?

A. THAT'S CORRECT.

Q. IN A NUTSHELL, IT MEANS THAT WHEN YOU HAVE NEW DEVELOPMENT, YOU HAVE TO PROVIDE PUBLIC ACCESS FROM THE ROADWAY TO THE SHORELINE?

A. THAT'S CORRECT.

Q. THIS IS THE TYPE OF PUBLIC ACCESS YOU WERE TALKING ABOUT YESTERDAY FROM TIME TO TIME WHEN YOU WERE TALKING ABOUT DESIGNING THE PUBLIC ACCESSWAYS AND THE INTERNAL ROADWAYS, CORRECT?

A. YES.

Q. AND THAT'S A STATE-IMPOSED REQUIREMENT?

A. THAT'S CORRECT.

Q. AND THE PROPERTY THAT YOU WERE INCLUDING IN THE ONE-THIRD OF THIS 37 ACRE PARCEL DEVOTED TO PUBLIC USE INCLUDED THE PORTION THAT YOUR CLIENT WOULD HAVE HAD TO DEDICATE FOR THIS STATE-IMPOSED REQUIREMENT, CORRECT?

A. YES. IT WAS PART OF IT.

Q. AND ANOTHER OF THE POLICIES OF THE COASTAL ACT IS THE PROTECTION OF ENVIRONMENTALLY SENSITIVE HABITAT?

A. YES.

Q. AND, AGAIN, THIS IS A STATE-IMPOSED REQUIREMENT?

A. YES.

Q. THIS REQUIREMENT INCLUDES, AMONG OTHER THINGS, THAT [p. 234] ENVIRONMENTALLY SENSITIVE HABITAT BE PROTECTED EITHER THROUGH RESTORATION OR PRESERVATION?

A. THAT'S CORRECT.

Q. AND OFTEN REQUIRES SOME FORM OF DEDICATION OF THE AREA WHICH IS PRESERVED OR RESTORED?

A. YES.

Q. AGAIN, THE AREAS THAT YOUR CLIENT WAS PREPARED TO PRESERVE OR RESTORE, THAT WAS PURSUANT TO A STATE-MANDATED REQUIREMENT?

A. YES.

Q. AND THAT WAS INCLUDED IN THE ONE-THIRD OR SO OF THIS PROPERTY THAT YOU INDICATED WAS BEING PROVIDED FOR PUBLIC USE?

A. YES.

Q. ANOTHER OF THE COASTAL ACTS DEALS WITH LOCATING NEW DEVELOPMENT, CORRECT?

A. YES.



Q. AND AMONG OTHER THINGS, THAT POLICY REQUIRES THAT PUBLIC ACCESS MUST BE MAINTAINED AND ENHANCED BY PROVIDING PARKING?

A. YES.

Q. AND YOU AT VARIOUS TIMES YESTERDAY REFERRED TO THE PARKING THAT WAS BEING PROVIDED, NOT FOR RESIDENTS OF THIS DEVELOPMENT, BUT TO PEOPLE THAT WOULD COME TO THE BEACH?

A. YES.

Q. AGAIN, THAT WAS A STATE-IMPOSED REQUIREMENT?

A. YES.

Q. AND THE PROPERTY AND THE COSTS INVOLVED - THE PROPERTY [p. 235] THAT WAS GOING TO BE REQUIRED FOR THIS WAS INCLUDED IN THAT ONE-THIRD OR SO THAT YOU TALKED ABOUT AS BEING DEVOTED TO PUBLIC USE?

A. YES.

Q. YOU TALKED A LITTLE BIT YESTERDAY ABOUT SOME OF THE - PUTTING UP THE POLES AND PROTECTING VISUAL ACCESS AND THE LIKE.

AGAIN, THAT WAS SOMETHING REQUIRED BY THE COASTAL ACT?

A. THE COASTAL ACT JUST STATES THAT DEVELOPMENT WILL BE SENSITIVE TO THE SURROUNDING AREA. IT WAS REALLY THE CITY THAT DEVELOPED THE POLICY ON WHAT THAT WOULD

MEAN FOR THIS PARTICULAR SITE. AND THAT WAS POLICY THAT WAS BASICALLY IN THE LOCAL COASTAL PLAN OR LAND USE PLAN THAT DEVELOPMENT BE SITED IN THE BOWL SO THAT IT NOT BE VISIBLE.

SO IT WAS REALLY A POLICY OF THE CITY ON HOW THAT WAS CARRIED OUT TO MEET THE MORE GENERAL REQUIREMENT OF THE COASTAL ACT THAT JUST SAYS DEVELOPMENT WILL BE SENSITIVE TO THE AREA.

Q. FAIR ENOUGH. THERE IS A COASTAL ACT POLICY DEALING WITH COASTAL VISUAL RESOURCES?

A. YES.

Q. AND IT'S LEFT IN CONSULTATION WITH STAFF OF THE COASTAL COMMISSION TO THE CITY TO KIND OF DEVELOP A PLAN THAT THEY THINK DOES THAT?

[p. 236] A. THAT'S CORRECT.

Q. THEN THE COASTAL COMMISSION STAFF, OF COURSE, REVIEWS THAT IN THE CONTEXT OF THE LAND USE PLAN?

A. YES.

Q. THERE IS ALSO, IS THERE NOT, A POLICY OF THE COASTAL ACT DEALING WITH HAZARDS?

A. YES.

Q. SOUNDS KIND OF OMINOUS. AMONG OTHER THINGS IT SAYS: DON'T PUT PROPERTY TOO

CLOSE TO THE SHORE BECAUSE IT MIGHT FALL INTO THE OCEAN?

A. YES.

Q. PART OF THE COASTAL ACT REQUIRES THERE BE CERTAIN SETBACKS?

A. YES. NOT SPECIFIC, BUT TO BE DETERMINED BY THE PARTICULAR HAZARD OR THE SITUATION.

Q. THE COASTAL COMMISSION AND ITS STAFF BASICALLY, ON A PROPERTY-BY-PROPERTY BASIS, DECIDES WHAT IS AN APPROPRIATE SETBACK?

A. AFTER THE APPLICANT DOES STUDIES AND PRESENTS DATA AND RECOMMENDATIONS, THAT'S RIGHT. THEY APPROVE OR DECIDE WHAT SHOULD BE THE ADEQUATE SETBACK.

Q. SO ALL OR PART OF THE SETBACK INVOLVED IN YOUR PROPOSED DEVELOPMENT WAS TO ACCOMMODATE A STATE-IMPOSED SETBACK REQUIREMENT, CORRECT?

A. YES, PART OF IT WAS. WE WENT FAR BEYOND THAT. PART OF IT [p. 237] WAS TO MEET THAT REQUIREMENT.

\* \* \*

[p. 248] Q. MAYBE MY QUESTION WASN'T CLEAR. IN THE UNIVERSE OF POSSIBILITIES THERE COULD HAVE BEEN ACCESS THROUGH THE STATE PARKS PROPERTY?

A. YES.

Q. COULD HAVE BEEN ACCESS THROUGH TIDE?

A. YES.

[p. 249] Q. OR POSSIBLY SOME OTHER ROAD IN THAT SUBDIVISION, BUT I'LL LUMP THEM TOGETHER, OKAY?

A. YES.

Q. ACCESS THROUGH DEL MONTE AVENUE?

A. YES.

Q. AND ACCESS THROUGH THE UNBUILT FRONT STREET?

A. YES.

Q. FRONT STREET WAS NEVER SERIOUSLY CONSIDERED, CORRECT?

A. CORRECT.

Q. STATE PARKS SAID YOU CAN'T HAVE ACCESS THROUGH OUR PROPERTY, AT LEAST UNTIL THE PLANNING PROCESS IS DONE?

A. THAT'S CORRECT.

Q. CITY COULDN'T DO ANYTHING ABOUT THAT, CORRECT?

A. CORRECT.

Q. DEVELOPER COULDN'T DO ANYTHING ABOUT THAT?

A. CORRECT.



Q. AT LEAST UNLESS IT WAS WILLING TO FUND THE PLANNING PROCESS?

A. THAT'S RIGHT.

Q. SO THERE WERE TWO POSSIBLE ACCESS ROUTES AVAILABLE?

A. YES.

Q. SO THE TESTIMONY ABOUT WHO CHOSE THE ACCESS ROUTES, THERE REALLY WASN'T MUCH CHOOSING TO BE DONE, WAS THERE?

A. IT NARROWED IT DOWN, BUT AT THAT TIME IS WHEN THE CITY MADE IT THAT THEY WOULD RATHER NOT HAVE THE ACCESS WHERE THE [p. 250] CURRENT ACCESS TO THE PROPERTY BUT RATHER HAVE IT SHIFTED TO THE EAST. THAT IS WHAT I WAS REFERRING TO.

Q. I APOLOGIZE. SO WHEN YOU SAY IT WAS THE CITY'S CHOICE OF ACCESS, YOU WERE SAYING IT WAS THE CITY'S CHOICE AS TO WHERE THE CONNECTION WOULD BE ON DEL MONTE?

A. THAT'S CORRECT.

Q. BECAUSE THERE WEREN'T ANY OTHER CHOICES TO TIE INTO DEL MONTE?

A. THAT'S CORRECT.

Q. LET'S TALK ABOUT HABITAT. ONE OF THE THINGS THAT WAS DONE EARLY ON IN THE PROJECT WAS, OF COURSE, TO STUDY THE HABITAT, CORRECT?

A. CORRECT.

Q. AND YOU TALKED ABOUT THE ENVIRONMENTAL IMPACT REPORT AND THE SUPPLEMENTAL REPORT.

THOSE REPORTS CONFIRM THAT THERE WAS ENVIRONMENTALLY SENSITIVE HABITAT?

A. YES.

Q. AND THE DUNE PORTION OF THE PROPERTY WAS CONSIDERED TO BE ENVIRONMENTALLY SENSITIVE HABITAT BY THE COASTAL COMMISSION?

A. YES.

Q. WE TALKED EARLIER THAT ONE OF THE POLICIES OF THE COASTAL ACT IS TO PROTECT SUCH?

A. YES.

Q. SO THE COASTAL COMMISSION STAFF WAS REQUIRING THAT CERTAIN [p. 251] PROTECTIONS FOR THE HABITAT BE INCLUDED IN THE LAND USE PLAN?

A. THAT'S CORRECT.

Q. AND THESE - SCOPE OF THESE AND WHAT WOULD BE REQUIRED WAS THE SUBJECT OF NEGOTIATIONS BETWEEN THE CITY AND THE COASTAL COMMISSION STAFF?

A. THAT'S CORRECT.

Q. BECAUSE THEY DIDN'T ALWAYS SEE EYE TO EYE?

A. RIGHT.

Q. AND YOU, OR SOMEBODY ON BEHALF OF PONDEROSA, PARTICIPATED IN THOSE?

A. YES.

Q. NOW, I'VE HANDED YOU EXHIBIT 26, WHICH IS AN IMPOSING LOOKING DOCUMENT. YOU CAN TAKE YOUR TIME TO LOOK AT IT, BUT I WILL TELL YOU IT'S A CITY MEMORANDUM WHICH INCLUDES AS AN ATTACHMENT INFORMATION FROM THE COASTAL COMMISSION.

IS THAT BASICALLY CORRECT?

A. THAT IS WHAT IT APPEARS TO BE, YES.

Q. AND THE FIRST PART - IT'S DATED FEBRUARY 1, 1984?

A. YES.

Q. AND IT DEALS WITH THE LOCAL LAND USE PLAN FOR THE DEL MONTE BEACH AREA?

A. YES.

Q. AND ATTACHED TO THIS IS A REPORT BY THE COASTAL COMMISSION STAFF, CORRECT?

A. YES.

[p. 252] Q. YOU'VE SEEN REPORTS SUCH AS THIS BEFORE IN YOUR WORK WITH THE COASTAL COMMISSION?

A. YES.

Q. WHEN A CITY SUBMITS A PROPOSED LAND USE PLAN TO THE STAFF, IT IS COMMON FOR THE

STAFF TO - IF THEY HAVE COMPLAINTS - TO CRITIQUE THE THINGS THAT THEY THINK ARE WRONG WITH THE PLAN, RIGHT?

A. YES.

Q. AND THEY WILL ALSO, AT LEAST, SOMETIMES INDICATE WHAT TYPES OF ADDITIONS WOULD BE REQUIRED TO THE LAND USE PLAN IN ORDER FOR THEM TO RECOMMEND THAT THE COASTAL COMMISSION ITSELF APPROVE IT?

A. YES.

Q. AND THE REPORT THAT IS ATTACHED TO THE CITY MEMORANDUM IS THAT KIND OF REPORT AND INCLUDES THOSE KINDS OF RECOMMENDATIONS, CORRECT?

A. YES.

Q. TURN TO PAGE 32. WE HAVE A BLOWUP HERE. THIS IS A SERIES OF MODIFICATIONS THAT WOULD RESULT IN CERTIFICATION DEALING WITH ENVIRONMENTALLY SENSITIVE HABITATS?

A. YES.

Q. IF YOU LOOK DOWN AT THE BOTTOM IN AREAS OF DUNE HABITAT, THEY WERE SAYING THAT A DUNE RESTORATION PROGRAM WOULD BE REQUIRED AS A CONDITION OF APPROVAL FOR ANY NEW DEVELOPMENT?

A. YES.

[p. 253] Q. THE CITY HAD AS ITS PROPOSAL THAT SUCH A PROGRAM WOULD BE REQUIRED



ONLY FOR DEVELOPMENT THAT DISTURBS DUNE VEGETATION?

A. YES.

Q. THEN THE REPORT GOES ON TO SPECIFY IN SUBSTANTIAL DETAIL WHAT IT WANTS INCLUDED IN A DUNE RESTORATION PROGRAM, CORRECT?

A. YES.

Q. IF YOU WOULD TURN TO PAGE 34. THESE ARE SOME MORE OF THE RECOMMENDATIONS FOR REQUIREMENTS TO BE IMPOSED BY THE COASTAL COMMISSION STAFF?

A. YES.

Q. IF YOU LOOK -

A. I BELIEVE THIS IS THE CITY PLAN, BUT IT HAS BEEN MARKED UP BY THE COASTAL STAFF; IS THAT CORRECT?

Q. THIS IS WHAT THE COASTAL COMMISSION STAFF IS SAYING HAS TO BE DONE IN ORDER FOR IT TO APPROVE IT?

A. UH-HUM.

Q. IF YOU LOOK IN THE MIDDLE OF PAGE 34, IT DEALS WITH WHAT TYPES OF CRITERIA AND APPROVALS ARE NEEDED WHERE YOU HAVE ENVIRONMENTALLY SENSITIVE HABITAT, CORRECT?

A. YES.

Q. AND IT PROVIDES THAT PRIOR TO LOCAL COASTAL PLAN CERTIFICATION, THE PLANS AND

MAPS DEALING WITH THE PROPOSED PROTECTION AND RESTORATION PLAN HAVE TO BE APPROVED BY THE COASTAL COMMISSION IN CONSULTATION WITH THE DEPARTMENT OF FISH AND GAME AND U.S. FISH AND WILDLIFE?

[p. 254] A. YES.

Q. IT ALSO PROVIDES RIGHT BELOW THAT AS A NEW POLICY, DELETING THE OLD POLICY, THAT ALL ESH, THAT IS, ENVIRONMENTALLY SENSITIVE HABITAT, SHOULD BE PROTECTED BY LOCATING NEW DEVELOPMENT SO AS TO AVOID THE HABITAT?

A. YES.

Q. AND THESE ARE POLICIES THAT WERE BEING REQUIRED BY THE COASTAL COMMISSION?

A. YES.

\* \* \*

[p. 271] Q. AM I CORRECT THAT WHEN YOU WENT AND APPEARED BEFORE THE CITY COUNCIL AT THE SEPTEMBER HEARING, YOU UNDERSTOOD THAT YOU WOULD HAVE THE RIGHT TO BUILD A 190-UNIT DEVELOPMENT WITH THAT ROAD CONFIGURATION, WITH THAT GENERAL PLACEMENT ON THE SITE SO LONG AS YOU COULD SATISFY THE CONDITIONS?

A. YES.

Q. AND YOU WERE ALSO AWARE THAT IF IN YOUR EFFORT TO SATISFY THE CONDITIONS THAT IT BECAME NECESSARY TO MODIFY THE SITE PLAN,

YOU WOULD HAVE TO COME BACK AND GET NEW APPROVAL?

A. YES.

\* \* \*

[p. 332] DONALD BRIGHT - DIRECT/JACOBSEN

Q. DID YOU IN THAT SAME SUMMER PREPARE, AS PART OF THE DEVELOPMENT, SOME RESTORATION PLANS CONCERNING THE SMITH'S BLUE BUTTERFLY?

A. I THINK WE PREPARED RESTORATION PLANS BEFORE, AS I REMEMBER. OVERALL, WE HAD ABOUT FIVE DRAFT AND FINAL RESTORATION PLANS. BUT WE DID MODIFY THE THEN APPLICABLE RESTORATION PLAN, CHANGING IT TO TAKE INTO CONSIDERATION NOT ONLY THE PRESENCE OF THE BUTTERFLY IN THIS PARTICULAR PART OF THE PHILIPS PARCEL, BUT ALSO TO ACCOMMODATE SOME OF THE CONCERNS AND CRITICISMS THAT HAD BEEN RECEIVED FROM THE DEPARTMENT OF FISH AND WILDLIFE SERVICES AND DEPARTMENT OF FISH AND GAME.

Q. LET ME SHOW YOU EXHIBIT 50 AND 52 AND ASK YOU IF YOU RECOGNIZE THOSE?

A. YES, I DO.

Q. WHEN YOU FOUND THIS EVIDENCE OF THE BUTTERFLY, AN [p. 333] ENDANGERED SPECIES, ON THE PROPERTY, DID YOU REPORT THAT FINDING TO

THE PROPER AGENCIES WITH AUTHORITY OVER THE MATTER?

A. WE WERE KIND OF EXCITED ABOUT IT. INDEED, WE REPORTED IT TO THE CITY, TO FISH AND WILDLIFE SERVICE, FISH AND GAME, DEPARTMENT OF PARKS AND RESTORATION AND TO THE COASTAL COMMISSION.

Q. UP TO THE POINT WHERE YOU FOUND EVIDENCE OF THE BUTTERFLY, HAD ANYONE, WHETHER IT WAS MR. ARNOLD OR ANY OF THESE OTHER GOVERNMENTAL AGENCIES, HAD ANYONE ACTUALLY FOUND A BUTTERFLY ON THIS PROPERTY BEFORE YOU DID?

A. WHEN YOU SAY "BUTTERFLY," YOU ARE TALKING ABOUT A SMITH'S BLUE, AND THE ANSWER IS NO. THERE ARE BUTTERFLIES OF OTHER TYPES THERE, BUT NO SMITH BLUES, THAT'S CORRECT.

Q. YOU REPORTED THAT TO VARIOUS AUTHORITIES, YOUR FINDING?

A. YES, WE DID.

Q. GO TO EXHIBIT 52. THIS IS A PRELIMINARY AND A RESTORATION PLAN IN THOSE TWO EXHIBITS, AREN'T THERE [sic]?

A. YES.

Q. YOU PREPARED THOSE IN JUNE AND JULY OF '84?

A. THAT'S CORRECT.



Q. DESCRIBE FOR THE JURY - SUMMARIZE - WHAT WAS THE APPROACH YOU WERE TAKING IN THE RESTORATION PLAN?

A. WELL, I MENTIONED THOSE THREE PHILOSOPHICAL APPROACHES BEFORE, AND WE WERE TAKING THE ONE IN THE MIDDLE. WE KNEW THAT THE COASTAL COMMISSION'S COMMENTS ON THE CITY OF [p. 334] MONTEREY'S DEL MONTE DUNE LAND USE PLAN WERE PREDICATED ON DEVELOPMENT, RESIDENTIAL DEVELOPMENT, OCCURRING ON THIS SITE.

WE KNEW THAT THE CITY, ALTHOUGH THEY HAD EARLIER TALKED ABOUT THIS BEING OPEN SPACE, ALSO CONCLUDED SOME DEVELOPMENT SHOULD BE THERE. AND SO OUR GOAL WAS TO FIGURE OUT HOW TO MAXIMIZE THE PROTECTION OF THE HABITAT OF THE DUNES.

I WANT TO DISTINGUISH THAT FROM THE HABITAT OF THE SMITH'S BLUE BUTTERFLY. TO MAXIMIZE THE PRESERVATION OF THE HABITAT OF THE DUNES WHILE PUTTING IN THE MOST THOUGHTFUL MANNER THE PROPOSED DEVELOPMENT.

Q. IF YOU COULD SUMMARIZE. AND IF YOU NEED TO, YOU CAN COME HERE TO THE EXHIBIT.

WHAT, IN GENERAL, WERE YOUR PROPOSALS UNDER THE RESTORATION PLAN?

A. TO DEVELOP DUNES, A SERIES OF DUNES, SOME OF WHICH WOULD BE MAN-MADE, PARTICULARLY ON THE PORTION OF THE PROPERTY DOWN CLOSEST TO THE OCEAN. TO DEVELOP AN AREA

ALONG THE EASTERN THE MARGIN OF THE PROPERTY WHERE THE HABITAT THAT CONTAINED BUCKWHEAT WOULD REMAIN. TO MAKE SOME CLEAN-UP EFFORTS THROUGH HERE WHICH CONTAINED BUILDINGS.

THERE WAS AN EXISTING ROAD THAT WAS ALREADY THERE THAT CAME UP ACROSS THROUGH THIS PORTION OF THE BACK DUNES IT'S CALLED. THIS IS THE HIGHEST DUNES IS [sic] THE BACK PORTION OF THE PROPERTY. AND ALSO TO DO SOME RESTORATION IN THESE AREAS, [p. 335] THAT IS, TRY TO MAXIMIZE BY PLANTING THE DEVELOPMENT OF THE BUCKWHEAT WITH THE IDEA THAT IF YOU HAD ENOUGH BUCKWHEAT THERE, YOU MIGHT HAVE THE RIGHT HABITAT SO THE SMITH'S BLUE BUTTERFLY WOULD COME ACROSS FROM OTHER AREAS AND EXPAND.

Q. YOU MENTIONED SOMETHING ABOUT THE NATURE OF THIS SITE THAT YOU WERE WORKING WITH. LET ME PUT IT IN TIME CONTEXT FOR YOU. IN JULY OF '84, WHEN YOU'RE LOOKING AT THESE RESTORATION PLANS OF YOURS, YOUR PROPOSALS, PONDEROSA HADN'T YET BUILT ANYTHING ON THIS PROPERTY, HAD IT?

A. NO.

Q. IT WAS GOING THROUGH AN APPROVAL PROCESS AT THAT TIME?

A. YES.

Q. COULD YOU, FROM THE PERSPECTIVE OF THE BIOLOGIST, DESCRIBE FOR THE JURY THE CONDITION OF THE PROPERTY AS IT EXISTED IN JULY '84 IN RELATION TO THE PROBLEMS IT CREATED FOR THE RESTORATION PLAN?

A. ONE OF THE REASONS WE CAME TO THE CONCLUSION THAT IT WAS A DAMAGED SITE AND THAT IT WOULD NEED THOUGHTFUL DEVELOPMENT TO PRESERVE ANY SIGNIFICANT HABITAT WAS THE FACT THAT THE SITE ITSELF WAS HIGHLY DISTURBED. AN INTERCEPTOR LINE, A SEWER LINE, HAD BEEN PUT THROUGH ALONG THE AREA SEVERAL HUNDRED FEET IN FROM THE OCEAN, AND AS A MITIGATION MEASURE, AND IN MY VIEW AN INAPPROPRIATE ONE, THE INSTALLATION HAD BEEN CONDITIONED BY THE DEVELOPMENT OF A BIG BERM OVER THE TOP OF THAT AREA.

Q. BY THE INTERCEPTOR LINE, AM I INDICATING THE SEWER LINE [p. 336] HERE?

A. THAT'S CORRECT. THEY PUT A BERM OVER THE TOP OF THAT, AND ON TOP OF THE BERM THEY ADDED JUTE MATTING AND PLANTED TREES, SOME OF WHICH ARE NOT EVEN ENDEMIC TO CALIFORNIA. THEY WENT TO SOME NURSERY AND PURCHASED THESE.

SO IT WAS AN ATTEMPT TO STABILIZE THE DUNE, NOT AN ATTEMPT IN ANY WAY TO MAXIMIZE THE NATIVE HABITAT ON THE SITE. SO THAT WAS AN AREA LARGELY NON-NATIVE AND CERTAINLY MAN-MADE.

THERE WERE ALL THE TANK PADS. HIGH PERCENTAGE, ABOUT 25 PERCENT OF THE BOWL, WAS COVERED BY ICE PLANT WHICH WAS INTRODUCED, TWO SPECIES OF ICE PLANT. AND IT IS VERY COMPETITIVE.

THE ICE PLANT PRODUCES A FAIR AMOUNT OF MATERIAL. IT'S A CHEMICAL WHICH IT RELEASES INTO THE GROUND THAT LITERALLY PRECLUDES OTHER PLANT SEED FROM GERMINATING. SO IT CLEARS THE AREA AS IT MOVES OUT. IT'S A SLOW MOVER. IT DOESN'T GROW FAST. AS IT MOVES OUT, IT HAS A TENDENCY TO PRODUCE THIS CHEMICAL WHICH KILLS OFF OTHER SEEDS SO OTHER PLANTS DON'T GERMINATE.

THERE WERE THE PIPELINES, THERE WERE THE ROADWAYS, THERE WERE MANY AREAS WHERE THERE WAS WHAT I WOULD CALL ASPHALTENE MATERIAL, NOT ASPHALT THAT DIDN'T HAVE ANY ROCKS IN IT, BUT HARD TARRING MATERIALS AS A RESULT OF THE ACTIVITIES AROUND THE TANKS.

DUNE BUGGIES HAD BEEN IN THERE, OFF-ROAD VEHICLES. [p. 337] SO THERE WERE A LOT OF TRAILS IN THERE. ALSO WAS A HAVEN FOR TRASH. IT WAS AN UNOCCUPIED SITE. IF YOU CAN FIND YOUR WAY AROUND THE CORNER, YOU COULD DUMP TRASH IN THEIR VERY EASILY.

I HAD ONE FEMALE STAFF MEMBER ON THIS SITE, BUT NEVER COULD SEND HER THERE ALONE BECAUSE WE HAD THREE HOMELESS PEOPLE ON THE SITE. SO I WOULD NEVER SEND HER THERE ALONE.



SO IT WAS A DIFFICULT SITE IN TERMS OF TRYING TO FIND WHAT YOU WOULD CALL REAL, TRUE NATIVE HABITAT. AND ALL THE REGULATORY AGENCIES, AND EVEN RICHARD ARNOLD, AGREED TO THAT. HIS DESCRIPTION IN HIS FIRST PUBLISHED PAPER WAS THAT THIS SITE WAS DECIMATED. THE FISH AND WILDLIFE SERVICE CONSIDERED THIS A HIGHLY DAMAGED SITE. AND I THINK WHAT I HAVE JUST POINTED OUT REFLECTS THE REASON FOR THAT CONCLUSION.

Q. THE ICE PLANT YOU DESCRIBED, WAS THAT IN WHAT MR. DAVIS REFERRED TO EARLIER AS THIS BOWL AREA?

A. IT WAS LARGELY AROUND EACH OF THE TANK PADS. THE TANK PADS ARE ALL WITHIN THE BOWL. AND BASED ON MY EXPERIENCE IN OTHER REFINERIES AND IN TALKING TO PEOPLE OVER THE YEARS, THE REASON IT WAS PLACED THERE WAS TO CUT DOWN ON EROSION SO THE TANK PAD WOULD NOT BE UNDERCUT AND SO THAT THE SAND WOULDN'T FALL OUT FROM UNDERNEATH THE TANK PAD AND THE TANK WOULD HAVE COLLAPSED OR SLIPPED OVER TO ONE SIDE AND YOU WOULD HAVE A LEAK.

Q. IS ICE PLANT NATIVE TO THAT AREA?

A. IT IS NOT. IT IS NOT EVEN NATIVE TO NORTH AMERICA.

[p. 338] Q. YOU MENTIONED ICE PLANT IS COMPETITIVE WITH OTHER PLANTS.

DOES THAT INCLUDE BUCKWHEAT?

A. IT PRECLUDES THEM. IT'S MORE THAN COMPETITIVE. IT MOVES IN AND PRODUCES A CHEMICAL WHICH KEEPS OTHER PLANT SEEDS FROM GERMINATING, AND THAT INCLUDES BUCKWHEAT.

Q. I GUESS WHAT I'M TRYING TO ASK IS IN A CONTEST BETWEEN ICE PLANT AND BUCKWHEAT, WHICH WINS?

A. THE ICE PLANT DOES. THE ICE PLANT MOVES VERY SLOWLY. SO THE BUCKWHEAT WOULD HAVE A WHILE IF IT IS A DISTANCE AWAY, 30 FEET, FOR EXAMPLE, FROM A LARGE ACCUMULATION OF ICE PLANT. IT WILL BE A LONG TIME BEFORE THE ICE PLANT GETS THERE. ONCE IT GETS THERE, IT WILL WIN BECAUSE IT PRODUCES THAT CHEMICAL.

Q. DID YOU DISCOVER ANY OF THIS LATIFOLIUM-TYPE BUCKWHEAT IN THE BERM AREA?

A. YES.

Q. CAN YOU DESCRIBE FOR THE JURY IN WHAT CONDITION YOU FOUND THAT TYPE OF BUCKWHEAT?

A. THE MAJORITY WERE JUVENILE. THEY WERE ISOLATED WITH CLUMPS OF MAYBE TWO OR THREE INDIVIDUALS. AND THEY WERE IN THE AREAS BETWEEN THE TANK PADS AND THE ROADS AND THE PIPELINE RIGHT OF WAYS AND SO ON.

Q. AS JUVENILE BUCKWHEAT, WOULD THAT BE SMITH'S BLUE BUTTERFLY HABITAT?

A. NO. AS I POINTED OUT BEFORE, YOU NEED THE FLUORESCENCE FOR THE NECTAR FOR THE MATING AND LARVAL DEVELOPMENT.

[p. 339] Q. THEY HAVE TO BE ADULT PLANTS?

A. ADULT PLANTS.

Q. OVER TIME IF NOTHING WERE DONE IN THIS BOWL AREA, THIS OWNER JUST LET IT SIT, WHAT WOULD HAVE HAPPENED BETWEEN THE ICE PLANT AND THE BUCKWHEAT WITHIN THE BOWL AREA?

A. THE ICE PLANT WOULD ULTIMATELY OCCUPY A SIGNIFICANT PERCENTAGE, IF NOT ALL, OF THE BOWL AREA.

Q. WOULD HAVE WON THE COMPETITION?

A. YES. THE ONLY COMPETITION IT CAN'T BEAT IS SAND, SAND EROSION. SO IF THE SAND ERODES FROM THE DUNE AND BLOWS OVER AND COMPLETELY COVERS UP THE ICE PLANT SO IT NO LONGER IS ABLE TO PHOTOSYNTHESIZE, IT WILL DIE. SO THAT IS THE ONE TIME IT WOULD LOSE, IF THERE WAS A MASSIVE MOVEMENT OF SAND.

Q. YOU SAID AT THE TIME IN THE SUMMER OF '84 THAT YOU WERE OUT HERE DOING YOUR SURVEYS AND LOOKING FOR THE BUTTERFLIES, OR EVIDENCE OF THEM.

WERE YOU IN COMMUNICATION WITH AGENCIES, SUCH AS UNITED STATES FISH AND WILDLIFE AND STATE FISH AND GAME?

A. YES.

Q. WERE YOU IN TOUCH WITH THIS RICHARD ARNOLD?

A. YES.

Q. WHEN YOU WOULD PREPARE A RESTORATION PLAN OR COME UP WITH SOME PROPOSAL, WOULD YOU SHARE IT WITH THOSE AGENCIES AND THOSE PEOPLE?

A. YES. THAT INCLUDES THE CITY AS WELL.

[p. 340] Q. THE CITY OF MONTEREY?

A. YES.

Q. WHAT WAS THE PURPOSE OF YOU SENDING YOUR REPORTS OUT TO ALL THESE PEOPLE?

A. WELL, THERE WERE THREE ISSUES HERE. ONE IS THE DEL MONTE DUNES LAND USE PLAN HAD NOT BEEN APPROVED. THEREFORE ONCE PONDEROSA HAD GOTTEN ITS APPROVAL, CONDITIONAL USE PERMIT FROM THE CITY OF MONTEREY, WE STILL HAD TO GO GET A PERMIT FROM THE COASTAL COMMISSION.

SO WE NEEDED TO BE SURE THAT WHEN WE GOT APPROVAL THAT THE CITY OF MONTEREY DIDN'T INCLUDE SOME PROVISION OR CONDITION THAT THE COASTAL COMMISSION WOULDN'T ACCEPT. WE KNEW WE HAD THE POTENTIAL FOR A RARE AND ENDANGERED SPECIES. THEREFORE, WE HAD TO DEAL WITH THAT HABITAT RECOVERY PLAN WHICH HAD BEEN PREPARED BY THE FISH



AND WILDLIFE SERVICE. SO THEY NEEDED TO BE INVOLVED.

CALIFORNIA FISH AND GAME, ALTHOUGH THERE IS NO LAW IN THIS STATE WHERE THEY CONTROL THE INSECTS, IS CONCERNED ABOUT PRESERVATION OF HABITATS, AND IT WAS APPROPRIATE TO HAVE THEM IN.

THEN IT WAS ALSO APPROPRIATE TO HAVE THE CALIFORNIA DEPARTMENT OF PARKS AND RECREATION INVOLVED BECAUSE THEY OWNED, AT THAT POINT IN TIME, THE LAND THAT WAS IMMEDIATELY TO THE EAST BETWEEN THE EASTERN BOUNDARY OF THE PHILIPS PROPERTY AND THE WESTERN END OF THE HOLIDAY INN, THE HOTEL.

[p. 341] Q. LET ME SHOW YOU EXHIBIT 67, WHICH IS AN AUGUST 29, 1984 MEMORANDUM FROM ONE PLANNER TO THE PLANNING DIRECTOR OF THE CITY OF MONTEREY.

SPECIFICALLY, DO YOU SEE WHERE THAT MEMO REFERS TO THE SITE RESTORATION PLAN FOR PHILIPS PETROLEUM?

A. YES.

Q. THE FIRST SENTENCE SAYS:

"FOLLOWING A SERIES OF CALLS AND CORRESPONDENCE BETWEEN BRIGHT AND ASSOCIATES, U.S. FISH AND WILDLIFE SERVICES AND DOCTOR RICHARD ARNOLD."

DO YOU RECALL YOU WERE TALKING WITH ALL THOSE PEOPLE IN THE SUMMER OF '84?

A. YES. IT SAYS LATER IN THAT PARAGRAPH DOCTOR ARNOLD RELAYED TO MR. FELL, WHO WAS THE CITY PERSON WHO WROTE THIS MEMO, THE RESULTS OF A MEETING THAT OCCURRED THE NIGHT BEFORE WITH MYSELF AND MY DAUGHTER, WHO WAS ON THE STAFF AT THAT TIME, AND DOCTOR ARNOLD AT HIS HOME.

Q. YOU ACTUALLY WENT TO DOCTOR ARNOLD'S HOME?

A. THAT'S CORRECT.

Q. IN THE SECOND PARAGRAPH THERE IS A REFERENCE TO THE HABITAT IN THE EASTERN PORTION OF THE SITE, MR. ARNOLD WANTING THE HABITAT IN THE EASTERN PORTION OF THE SITE PRESERVED.

DO YOU SEE THAT REFERENCE?

A. I DO.

Q. IN YOUR RESTORATION PLAN THAT YOU HAD, YOU PROPOSED TO [p. 342] PRESERVE THE HABITAT IN THE EASTERN PORTION OF THE SITE?

A. CORRECT.

Q. SO YOU AGREED TO DO THAT?

A. THAT IS ONE OF THE CHANGES THAT WAS MADE IN THE PLAN.

Q. THERE IS THE FURTHER STATEMENT HERE THAT DOCTOR ARNOLD, AND I QUOTE:

"FELT THAT EVEN WITH A GOOD RESTORATION PLAN, THE BUTTERFLIES ON THIS SITE

WOULD BE ISOLATED FROM OTHER HABITAT ON OTHER SITES WITHIN THEIR RANGE AND THUS WOULD BE VULNERABLE TO EXTINCTION." DO YOU SEE THAT PHRASE?

A. I DO.

Q. YOU HAD TALKED TO MR. ARNOLD THE NIGHT BEFORE, HAD YOU?

A. YES.

Q. WHEN HE'S REFERRING TO THE FACT THAT EVEN WITH A GOOD RESTORATION PLAN, EXTINCTION WOULD OCCUR BECAUSE THEY WOULD BE AWAY FROM OTHER SITES.

WHAT SITES IS HE TALKING ABOUT?

A. I'M NOT SURE. BECAUSE IN MY VIEW, THIS SITE WAS ALREADY ISOLATED.

Q. BUT WERE THERE SO MANY OTHER SITES IN THAT AREA?

A. THERE IS A SITE A MILE OR SO TO THE WEST AT THE NAVY POSTGRADUATE SCHOOL, AND THEN THERE IS A SERIES OF DUNE AREAS ABOUT TWO MILES TO THE NORTH ASSOCIATED WITH FORT ORD.

THERE WAS AN ACCUMULATION IN SAND CITY, WHICH IS [p. 343] SORT OF IN BETWEEN THOSE WHICH HAD BEEN HIGHLY DISTURBED, BUT EACH OF THESE HAD AROUND THEM ENOUGH MAN-MADE STRUCTURES TO ESSENTIALLY LEAVE THEM ISOLATED.

Q. YOU MENTIONED TO THE JURY EARLIER THESE BUTTERFLIES IN THEIR ONE WEEK OF LIFE MIGHT BE ABLE TO FLY OR SKIP OR HOP, WHATEVER, A HUNDRED FEET OR 200 FEET OR SO?

A. THAT IS THE MAXIMUM DISTANCE KNOWN, YES.

Q. DO I UNDERSTAND THAT WHEN THEY FLY OR HOP AND JUMP, WHATEVER IT IS, THIS 200 FEET, THEY HAVE TO FIND A NEW BUCKWHEAT PLANT, DON'T THEY?

A. TO BE SUCCESSFUL, YES. AND THEY NEED TO FIND ONE WHICH IS MATURE AND HAS THE RIGHT FLUORESCENCE.

Q. AT THE TIME DOCTOR ARNOLD IS SAYING THAT EVEN WITH A GOOD RESTORATION PLAN THERE COULD BE EXTINCTION BECAUSE OF THESE OTHER SITES, WAS THERE ANY WAY FOR BUTTERFLIES TO GET FROM THE SUBJECT PROPERTY TO THE NAVAL POSTGRADUATE SCHOOL?

A. NOT IN MY VIEW.

Q. WHAT STOOD IN THEIR WAY?

A. SEVERAL THINGS: THE HOUSING DEVELOPMENT, ALL THE STRUCTURES THAT EXISTED ON THE BACK SIDE OF THE DUNE, AND THE BACK SIDE OF THE DUNE CONTAINED A SERIES OF PLANTED EUCALYPTUS TREES, AN ACCUMULATION OF OAK TREES, AND THERE WAS AN EXISTING ROAD ALREADY THERE. ALL OF THOSE WOULD BE IMPEDIMENTS, SIGNIFICANT IMPEDIMENTS, TO THE MOVEMENT OF THIS BUTTERFLY FROM EITHER THE



EAST TO THE WEST TO GO FROM THIS SITE TO THE [p. 344] POSTGRADUATE SCHOOL OR TO COME FROM THE POSTGRADUATE SCHOOL TO HERE. THERE WERE A NUMBER OF OTHER DEVELOPMENTS FURTHER TO THE EAST WHICH WOULD HAVE PRECLUDED ANY MOVEMENT FROM THE FORT ORD SITES.

Q. SUCH AS THE HOTEL?

A. YES.

Q. AND HIGHWAY 1?

A. HIGHWAY 1.

Q. COULD THOSE BUTTERFLIES HAVE FLOWN OR SKIPPED OVER HIGHWAY 1?

A. THEY MIGHT HAVE BEEN ABLE TO DO THAT IN TERMS OF DISTANCE, BUT UNLESS THEY FOUND A HOLE IN THE TRAFFIC WHERE THE VELOCITY OF THE CAR WOULD NOT BE STIRRING UP ALL THE WIND, THEY WOULD NOT BE ABLE TO FIND THEIR WAY ACROSS, AND THEY MIGHT GET ALL THE WAY OVER THERE AND COULD ONLY GO A COUPLE OF HUNDRED FEET AND END UP IN AN AREA WHERE THERE WAS NO BUCKWHEAT.

Q. SO DOCTOR ARNOLD WAS LOOKING AT YOUR RESTORATION PLANS IN 1984 AND THOUGHT NO MATTER WHAT YOU DID ON THE SITE, NO MATTER, HOW GOOD YOUR RESTORATION PLAN WAS, THIS SMITH'S BLUE BUTTERFLY COULD STILL GO EXTINCT, CORRECT?

MR. YUHAS: OBJECTION. LEADING.

THE COURT: SUSTAINED.

Q. (BY MR. JACOBSEN) WHAT WAS HIS VIEW ON THAT?

A. DOCTOR ARNOLD'S VIEW, AS FAR AS I WAS CONCERNED, WAS NO DEVELOPMENT WAS APPROPRIATE FOR THIS SITE; WE NEED TO LEAVE IT [p. 345] AS AN OPEN SITE AND TO REMOVE ANY IMPEDIMENTS THAT ARE THERE SO THAT THE POTENTIAL WOULD BE THERE FOR MIGRATION.

IN MY VIEW EVEN IF WE HAD DONE ALL THAT AND THE POTENTIAL WAS IMPROVED BY THE REMOVING OF THE BUILDINGS AND THE TREES AND THE ROAD AND SO ON ON THE BACK SIDE OF THE DUNE, THE DISTANCE WAS SO GREAT AND THERE WERE SO MANY OTHER MAN-MADE STRUCTURES IN THE VICINITY THAT THE LIKELIHOOD OF CROSS FERTILITY OF ONE MEMBER FROM ONE GROUP MOVING TO ANOTHER WAS EXTREMELY REMOTE.

Q. ON PAGE 2 OF THAT MEMO THE PLANNER HERE, UNDER NUMBER 2, TALKS ABOUT IN THE SUMMER OF '84 THAT:

"THE APPLICANT COULD BE ASKED TO REVISE HIS PLAN BY REMOVING STRUCTURES IN THE EASTERN PART OF THE SITE TO OBTAIN MORE EFFECTIVE CONTIGUOUS HABITAT ALONG THAT BOUNDARY."

DO YOU SEE THAT REFERENCE?

A. I DO.

Q. HERE, OF COURSE, WE ARE TALKING ABOUT A PLAN THAT WAS APPROVED AFTER THAT MEMO, BUT DID YOU, AS PART OF YOUR RESTORATION PLAN, FOLLOW THAT PLANNING STAFF MEMBER'S RECOMMENDATION AND MAKE A HABITAT CONTIGUOUS ALONG THE EASTERN PART OF THE PROPERTY?

A. AFTER DISCUSSIONS WITH FISH AND WILDLIFE SERVICE, FISH AND GAME AND COASTAL COMMISSION, IRRESPECTIVE OF WHAT THE STAFF MEMBER SAYS, IT WAS CLEAR THAT IN ORDER TO GET THEIR GENERAL [p. 346] APPROVAL FOR WHAT WAS BEING PROPOSED THAT WE WERE GOING TO HAVE TO LEAVE MORE OF THAT AREA IN A NATURAL CONDITION.

ONE OF THE EARLIER VERSIONS HAD CREATING LAND DUNE IN THAT AREA AFTER THE LAND HAD BEEN GRADED. THAT WAS THROWN OUT. THE HOUSING PROJECT ULTIMATELY WAS SHIFTED TO THE WEST. THE WIDTH OF THAT STRIP WAS INCREASED.

BUT YOU CAN'T LOOK AT IT IN THAT NARROW CONTEXT. YOU MUST ALSO LOOK TO THE FACT THAT IMMEDIATELY TO THE EAST OF THE EASTERN CROWN OF THIS PROPERTY IS THE STATE PARKS PROPERTY ON WHICH THERE ARE BUCKWHEATS. SO WE WERE ADDING THIS STRIP TO THE BUCKWHEAT AREA AND, THEREFORE, LEAVING A MUCH BROADER SITE WHICH POTENTIALLY COULD SERVE AS A BREEDING AREA FOR THE SMITH'S BLUE BUTTERFLY.

Q. ALONG THE EASTERN PROPERTY LINE THERE IS NOT A WALL. IT'S THE SAME HABITAT ON THE OTHER SIDE OF IT?

A. BUTTERFLIES DON'T KNOW ANYTHING ABOUT POLITICAL BOUNDARIES.

Q. OR LOT LINES?

A. OR LOT LINES.

Q. YOU TESTIFIED YOU HAD BEEN DEALING WITH THE COASTAL COMMISSIONER ON THIS AS WELL DURING THE PERIOD 1983 AND '84?

A. YES.

Q. WHO AT THE COASTAL COMMISSION WERE YOU TALKING TO DURING THAT TIME PERIOD?

A. FOR PURPOSES OF SPECIFICS, I TALK TO MICHAEL FISHER, WHO [p. 347] WAS THE EXECUTIVE DIRECTOR, TO ED BROWN, WHO DIRECTED THE DISTRICT OFFICE IN SANTA CRUZ, AND SENIOR PLANNER DAVID LOOMIS. AND DAVID HAD BEEN WITH THE COASTAL COMMISSION FOR SOME TIME. IN POINT OF FACT, WHEN I WAS ON THE COMMISSION IN THE SOUTH COAST, HE WORKED IN THE LONG BEACH OFFICE.

AND WHAT WE WERE TRYING TO DO WAS TO COME UP WITH A CONSENSUS BETWEEN THE DIFFERENCES OF OPINION OVER THE DEL MONTE DUNES LUP BETWEEN WHAT THE CITY WANTED TO DO AND WHAT THE COASTAL COMMISSION THOUGHT THEY SHOULD DO.



IF THE DEL MONTE DUNES LUP HAD NOT BEEN APPROVED ONCE WE GOT AN APPROVAL, WE KNEW WE HAD TO GO BACK TO THE COASTAL COMMISSION. IT WOULD HAVE BEEN FUTILE TO HAVE GOTTEN PERMISSION FROM THE CITY KNOWING WHEN WE WALKED INTO THE COASTAL COMMISSION OFFICE, WE WOULD BE DENIED.

SO WE NEEDED DO WORK THOSE THINGS TOGETHER. THAT IS WHAT WE ATTEMPTED TO DO. PART OF THE EFFORT WAS TO POINT OUT THAT THE CITY WASN'T AS BAD AS THE COASTAL COMMISSION THOUGHT, AND VICE VERSA, AND THEN TO LOOK FOR WAYS TO RESOLVE THE DIFFERENCES.

AND FOR THIS SITE THE DIFFERENCES LARGELY CENTERED AROUND HOW MUCH YOU LEFT BACK FROM THE MEAN HIGH TIED [sic] LINE AS PUBLIC USABLE PROPERTY, HOW YOU GOT IN AND OUT OF THE SITE, WHAT YOU CALL INGRESS AND EGRESS, AND WHAT YOU DID ON THE BACK DUNE.

\* \* \*

[p. 370] Q. IN THAT LETTER FISH AND GAME ADVISES THE CITY THAT THEY CONCUR WITH FISH AND WILDLIFE'S POSITION, DON'T THEY?

A. CORRECT.

Q. THAT IS, THIS PROJECT - THAT THE SUBJECT PROJECT WOULD BE OF LITTLE CONSEQUENCE TO THE BUTTERFLY SPECIES AS A WHOLE, THAT WAS THEIR FINDING?

A. CORRECT.

Q. LATER IN THAT LETTER - DID THIS LETTER APPROVE YOUR RESTORATION PLAN?

A. IT DID.

Q. THERE WERE THREE THINGS THAT FISH AND GAME WANTED. ONE WAS TO ADD A PROVISION TO THE HOMEOWNER'S ASSOCIATION WHICH REQUIRED THE HOMEOWNER'S ASSOCIATION TO BE RESPONSIBLE FOR MAINTAINING THE HABITAT AREA.

DO YOU SEE THAT REFERENCE?

A. YES.

Q. WAS THAT AGREEABLE TO YOU?

A. YES.

Q. DID YOU MAKE THAT PART OF YOUR RESTORATION PLAN?

A. PONDEROSA ACCEPTED THAT. IT WAS PART OF THE PLAN.

Q. SECONDLY, FISH AND GAME WANTED - THEY AGREED WITH FISH AND WILDLIFE THAT THE HABITAT UNDER RESTORATION BE MANAGED AS PART OF THE STATE LAND TO THE EAST.

[p. 371] DID YOU THEN MAKE THAT MODIFICATION TO YOUR RESTORATION PLAN?

A. WE DID.

Q. AND, THIRDLY, FISH AND GAME WANTED TO BE ADDED AS PART OF THE REVIEW GROUP FOR ANYTHING THAT HAPPEN IN THE FUTURE.

DID YOU AGREE TO THAT?

A. YES.

Q. DID FISH AND GAME EVER AT ANY TIME WITHDRAW THIS APPROVAL OF YOUR RESTORATION PLAN?

A. NO, NOT TO MY KNOWLEDGE.

Q. NOW, THERE WAS A MEMORANDUM YOU MENTIONED. LET ME FIRST GET TO ONE OTHER LETTER FROM FISH AND GAME, EXHIBIT 94. THAT IS A JULY LETTER FROM FISH AND GAME ADDRESSED TO YOU.

DO YOU REMEMBER RECEIVING THAT?

A. YES.

Q. AND IN THAT - YOU SENT THEM AN AMENDED PLAN, HADN'T YOU?

A. YES.

Q. THEIR RESPONSE TO THIS AMENDED PLAN WAS WHAT?

A. THEY SUPPORTED THE INFORMATION THAT WAS IN THE MAY 10TH LETTER THAT WE JUST WENT THROUGH WHICH CONSTITUTED THEIR APPROVAL.

THEY THEN ASKED THAT THE AREA DESIGNATED TO BE RESTORED AS THE SMITH'S BLUE BUTTERFLY HABITAT BE SUBSEQUENT TO RESTORATION. YOU KNOW, AFTER IT WAS OVER, IT WOULD BE DEDICATED TO A STATE AGENCY FOR FUTURE OPERATION.

[p. 372] Q. WAS THAT AGREEABLE?

A. THAT WAS AGREEABLE.

Q. BY DEDICATED, THAT MEANS ACTUALLY GIVEN FREE OF CHARGE TO THE STATE OF CALIFORNIA?

A. THAT'S RIGHT. DEDICATED, AS I IMAGINE ON THE TITLE OF A PROPERTY AS OPEN SPACE AND TRANSFERRED TO A STATE AGENCY FOR MANAGEMENT AND CONTROL.

THEN, FINALLY, THEY BELIEVED THERE WAS SOME AMBIGUITY BETWEEN WHAT THE PROPOSAL SHOWED FOR THE LOCATION OF THE UNITS AND WHAT THE COASTAL COMMISSION STAFF HAD REGARDING DEVELOPMENT WESTWARD OF SEA-FOAM AVENUE. THAT WAS AN ERROR ON MR. HUNTER'S PART AND THE SUBSEQUENT CONSERVANCY CORRECTED THAT ISSUE.

Q. YOU MENTIONED A CITY STAFF MEMO. LET ME SHOW YOU EXHIBIT 100. THAT IS AN AUGUST 13, 1985 MEMORANDUM FROM MR. NORTON - EXCUSE ME. I'M ON THE WRONG ONE. FROM MR. NORTON TO THE PLANNING DIRECTOR IN WHICH HE SAYS MR. ELLIOTT OF FISH AND GAME STATED THAT THEIR JULY 25 LETTER THAT YOU WERE JUST READING FROM DOES REPRESENT APPROVAL, SUBJECT TO THE CONDITIONS THEY LISTED IN THEIR EARLIER LETTER.

DID YOU SPEAK TO MR. ELLIOTT AMONG THE OTHER PEOPLE AT FISH AND GAME THAT WE HAVE BEEN TALKING ABOUT?



A. YES.

Q. AT ANY TIME AFTER THIS DATE, AUGUST 13, 1985, DID MR. ELLIOTT, OR ANY REPRESENTATIVE OF FISH AND GAME, ADVISE [p. 373] YOU IN ANY WAY THAT THE APPROVAL CONTAINED IN THEIR MAY AND JULY 1985 LETTERS HAD BEEN WITHDRAWN OR RESCINDED IN ANY WAY?

A. NO.

Q. MR. YUHAS YESTERDAY WAS ASKING MR. DAVIS ABOUT SOME MEETING THAT OCCURRED LATER IN '86 AT THE TIME THIS PROJECT WAS DENIED. HE READ FROM SOME MINUTES.

WERE YOU AT A MAY 1986 MEETING BEFORE THE CITY COUNCIL?

A. YES.

Q. DO YOU REMEMBER WHEN A MR. THOMPSON APPEARED ON BEHALF OF FISH AND GAME?

A. I'M NOT SURE THAT IS HIS NAME. IS IT JOHNSON OR THOMPSON?

Q. LET ME GET THE EXACT NAME. YOU RECALL A JOHNSON FROM FISH AND GAME BEING THERE?

A. SEEMS TO RING A BELL. HE WAS A LOCAL REPRESENTATIVE WORKING FOR MR. HUNTER.

Q. DID MR. JOHNSON SAY AT THAT HEARING THAT THE APPROVAL IN THEIR MAY 10TH AND JULY

25TH LETTERS HAD BEEN WITHDRAWN IN ANY WAY?

A. NO.

Q. WAS MR. JOHNSON -

WHAT POSITION DID MR. JOHNSON HAVE WITH FISH AND GAME?

A. I'M NOT SURE. I THINK HE'S JUST A FIELD STAFF MEMBER IN THAT PARTICULAR REGION FOR FISH AND GAME.

[p. 374] Q. YOU GOT LETTERS FROM MR. PARNELL.

WHO IS MR. PARNELL?

A. CALIFORNIA DIRECTOR OF THE DEPARTMENT OF FISH AND GAME.

Q. WHO IS MR. HUNTER?

A. MR. HUNTER IS THE MANAGER FOR REGION 5 IN WHICH THIS SITE IS LOCATED. THERE ARE FIVE REGIONS. CALIFORNIA IS DIVIDED INTO FIVE REGIONS FOR MANAGEMENT OF FISH AND GAME RESOURCES.

Q. SO WHEN YOU WERE TALKING WITH REPRESENTATIVES OF THE FISH AND GAME IN TERMS OF APPROVAL, DID YOU TALK TO THE PEOPLE IN CHARGE, LIKE THE DIRECTORS AND REGIONAL MANAGERS, OR DID YOU TALK TO THE FIELD STAFF?

A. WE TALKED TO THE PEOPLE WHO WERE IN CHARGE, BECAUSE THIS WAS A MANAGEMENT DECISION.

Q. GOING BACK TO THE FISH AND WILDLIFE LETTER WITH THE APPROVAL, HERE MR. NORTON IS EXPLAINING THAT FISH AND WILDLIFE'S BIOLOGICAL OPINION WAS THAT THE PROJECT WOULD NOT JEOPARDIZE THE CONTINUED EXISTENCE OF THE SMITH'S BLUE BUTTERFLY.

DID YOU AGREE WITH THAT ASSESSMENT BY FISH AND WILDLIFE?

A. YES.

Q. MR. NORTON NOTES THE HEAD OF FISH AND WILDLIFE, OR THE PERSON MAKING THE OPINION, ALSO CONTAINED RECOMMENDATIONS AS TO HOW RESTORATION COULD BEST BE IMPLEMENTED.

WERE THOSE RECOMMENDATIONS IN THE MARCH 22, '85 [p. 375] LETTER?

A. THEY WERE.

Q. DID YOU INCORPORATE THOSE RECOMMENDATIONS OF FISH AND WILDLIFE INTO YOUR RESTORATION PLAN?

A. TO THE MAXIMUM DEGREE THEY WERE FEASIBLE BASED UPON THE REQUIREMENTS OF THE CITY FOR THE VIEW VISTA BLOCKING DUNE WHICH REPRESENTED A BIT OF A PROBLEM FROM A BIOLOGICAL POINT OF VIEW AND BASED UPON THE CHANGES TO THE ENTRY THROUGH DEL MONTE

AVENUE TO MEET THE COASTAL COMMISSION CONCERNS ABOUT MINIMIZING THE IMPACTS TO THE BACK DUNE.

SO THE POINT IS WE DID MOST OF THE THINGS WE COULD DO WITHIN THE LIMITS THAT WERE ALLOTTED TO US. THERE ARE OTHER AGENCY CONSTRAINTS THAT PRECLUDED DOING WHAT THEY ASKED FOR.

Q. ALTHOUGH FISH AND WILDLIFE GAVE YOU THE APPROVAL, DID THEY STATE -

DID MR. SHAKE STATE AN OPINION IN THAT LETTER AS TO WHAT HE THOUGHT YOUR CHANCES FOR SUCCESS WERE?

A. VERY LOW.

Q. BASED UPON WHAT?

A. FISH AND WILDLIFE HAD AN EXPERIMENT WHICH DOCTOR ARNOLD WAS ALSO INVOLVED IN AT ANTIOCH DUNES WHERE THEY TRIED TO RESTORE THE BUCKWHEAT PLANTS BY GROWING THEM FIRST IN THE LABORATORY IN A GREENHOUSE SCENARIO AND THEN TRANSPLANTING THEM TO THE SITE.

[p. 376] BUT THEY FAILED TO TAKE INTO ACCOUNT ONE PROBLEM, AND THAT WAS THE NUMBER OF PEOPLE TRAMPLING OVER THE DUNES. SO BEFORE THOSE PLANTS GOT ESTABLISHED, THEY DIED. THEY WERE BENT OR PULLED OUT OF THE GROUND. SO IT WAS NOT SUCCESSFUL.



SO MR. SHAKE HEARD ABOUT THAT, AND THAT WAS THE BASIS FOR HIS CONCERN. IT'S UNFORTUNATE AT THAT TIME HE WAS NOT AWARE OF THE OTHER PROJECT THAT RICHARD ARNOLD WAS INVOLVED IN IN EL SEGUNDO WHICH WAS A TREMENDOUS SUCCESS DOING EXACTLY THE SAME THING.

Q. DID YOU CONTEMPLATE IN YOUR PLAN KEEPING PEOPLE AWARE FROM THE AREA SO THE PLANTS COULD GROW?

A. WE WERE CONCERNED WITH RESTRAINING THE DOINGS OF PEOPLE THAT LIVED IN THE DEVELOPMENT.

Q. THAT WAS TAKEN CARE OF?

A. MANAGE IN THE RESTORATION PLAN.

Q. TO WHATEVER EXTENT MR. SHAKE AT FISH AND WILD LIFE APPROVED THE RESTORATION PLAN BUT THOUGHT IT MIGHT HAVE TROUBLE SUCCEEDING, DID HE INDICATE THERE WAS ANY OTHER ALTERNATIVE HE THOUGHT MIGHT BE MORE SUCCESSFUL?

A. THAT WAS NOT HIS ROLE. HE DID NOT DO THAT, BECAUSE, OBVIOUSLY, HE WAS JUST FOLLOWING THE RESPONSIBILITIES OF THE RARE AND ENDANGERED SPECIES ACT TO SEE IF A LOSS OF THIS SITE WOULD JEOPARDIZE THE DEMISE OF THE SPECIES, AND HIS OPINION WAS IT DID NOT.

\* \* \*

[p. 399] BRIGHT-CROSS/YUHAS

Q. (BY MR. YUHAS) THE 1984 APPROVAL OF THE CONDITIONAL USE PERMIT - WE ARE SWITCHING TOPICS NOW - YOU TALKED A LITTLE ON DIRECT ABOUT THE CONDITION THAT HAD BEEN INCLUDED AS PART OF THAT APPROVAL.

PRIOR TO THE CITY'S DECISION TO APPROVE THE PROJECT, [p. 400] YOU IN FACT HAD PROPOSED A CONDITION THAT REQUIRED INPUT FROM FISH AND WILDLIFE AND FISH AND GAME AS WELL, CORRECT?

A. CORRECT.

Q. YOU DIDN'T DISAGREE IT WAS APPROPRIATE FOR THE CITY TO SEEK THAT KIND OF INPUT?

A. WE HAD HAD - NO.

Q. BECAUSE THE CITY DID NOT HAVE A BIOLOGIST OR ENTOMOLOGIST ON ITS STAFF, DID IT?

A. I'M NOT AWARE THEY DID.

Q. AND THEY ARE NOT EXPERTS ON THIS PARTICULAR BUTTERFLY?

A. I HAVE NO BASIS FOR MAKING EVALUATIONS OF THAT.

Q. AT THE TIME YOU HAD SENT OUT - AT THE TIME OF THE SEPTEMBER 1984 APPROVAL - STRIKE THAT.

AT THE TIME OF THE 1984 CONDITIONAL USE PERMIT APPROVAL, YOU HAD ALREADY DEVELOPED A RESTORATION PLAN, CORRECT?

A. YES.

Q. AND YOU HAD SENT IT OUT FOR COMMENT TO FISH AND WILDLIFE, FISH AND GAME AND OTHERS?

A. YES.

Q. AND YOU HAD GOTTEN SOME RESPONSE FROM FISH AND WILDLIFE ON THE PLAN?

A. YES.

Q. THEY DID NOT APPROVE THE PLAN AT THAT TIME?

A. NO.

[p. 401] Q. IN FACT, DOCTOR ARNOLD HAD COMMENTED ON THE PLAN AS WELL?

A. I BELIEVE SO.

Q. AND HE HAD SAID, IN HIS VIEW ANYWAY, IT HAD SOME BIOLOGICAL PROBLEMS?

A. YES.

Q. YOU SAID THAT THE SKEPTICISM THAT FISH AND WILDLIFE HAD REGARDING RESTORATION PLANS RELATED TO ONE PARTICULAR EXPERIENCE?

A. ONE AMONG MANY, BUT PRIMARILY I SAID ANTIOCH DUNES, YES.

Q. WHEN HAD THAT ATTEMPTED RESTORATION PLAN OCCURRED?

A. THAT WAS ONGOING AT THE TIME OF THE REVIEW OF THE PHILIPS SITE.

Q. AFTER THE RESTORATION PLAN WAS PREPARED, THIS JULY '84 PLAN WAS PREPARED, YOU CONTINUED TO WORK ON PUTTING TOGETHER A FINAL RESTORATION PLAN, CORRECT?

A. YES.

Q. AS PART OF THAT WORK, AM I CORRECT YOU DID SOME SURVEYS OF THE SITE IN 1985?

A. LAST OF '84 AND '85, YES.

Q. AND YOU COUNTED THE BUCKWHEAT AT THAT TIME?

A. YES.

Q. AND YOU THEN PARTICIPATED IN THE HEARING PROCESS BEFORE THE CITY COUNCIL IN MAY AND JUNE OF '86?

A. YES.

Q. IN TERMS OF WHETHER THERE WAS OR WAS NOT APPROVAL, I WANT [p. 402] TO GO OVER SOME OF THAT. STARTING WITH THE FIRST PUBLIC HEARING IN MAY, MR. JOHNSON WAS THERE, CORRECT?

A. YES.

Q. MR. JOHNSON CERTAINLY IDENTIFIED HIMSELF AS BEING FROM FISH AND GAME?

A. HE DID.

Q. HE DIDN'T SAY THAT, YOU KNOW, I'M FROM FISH AND GAME, BUT THIS IS MY OWN PERSONAL VIEW, DID HE?



A. I'M NOT SURE ABOUT THAT. MY MEMORY IS FUZZY. HE MAY HAVE SAID THAT.

Q. THERE'S NO QUESTION WHETHER HE WAS THERE AS AN INDIVIDUAL OR ON BEHALF OF FISH AND GAME, THE VIEW HE EXPRESSED WAS THAT THE RESTORATION PLAN THAT HAD BEEN PREPARED WAS NOT ADEQUATE?

A. THAT WAS HIS VIEW.

Q. IN JUNE OF '86 THERE WAS ALSO A REPRESENTATIVE OF FISH AND GAME THERE, CORRECT?

A. I BELIEVE SO.

Q. WAS THAT MR. JOHNSON AGAIN?

A. I HAVE FORGOTTEN. I BELIEVE THAT'S CORRECT, YES.

Q. BUT HE PRESENTED THE LETTER THAT YOU TALKED ABOUT ON DIRECT EXAMINATION AT THAT MEETING, CORRECT?

A. THAT'S CORRECT, YES. HE PRESENTED THE LETTER.

Q. AT THAT HEARING THE REPRESENTATIVES OF FISH AND GAME DIDN'T SAY, "DISREGARD WHAT WE SAID AT THE LAST HEARING. THIS IS REALLY NOW OUR POSITION," DID THEY?

[p. 403] A. NO, THEY DIDN'T.

Q. THEY DIDN'T IN ANY WAY SUGGEST THAT THE COMMENTS MADE BY MR. JOHNSON AT THE MAY 6 HEARING WERE SOMEHOW INAPPROPRIATE OR UNAUTHORIZED?

A. DID YOU SAY DID THEY MAKE A COMMENT?

Q. THEY DID NOT MAKE A COMMENT?

A. MR. JOHNSON DID NOT MAKE SUCH A COMMENT.

Q. AND NO ONE ELSE FROM FISH AND GAME MADE SUCH A COMMENT?

A. NO ONE ELSE FROM FISH AND GAME WAS THERE THAT I'M AWARE OF [sic].

Q. WITH RESPECT TO FISH AND WILDLIFE, THERE WAS ALSO PRESENTED AT THE HEARING A LETTER THAT SOMEONE FROM FISH AND WILDLIFE HAD PROVIDED, I BELIEVE, TO THE SIERRA CLUB?

A. THAT'S CORRECT.

Q. THAT LETTER WAS PROVIDED TO THE COUNCIL AT THE HEARING?

A. I DON'T REMEMBER PRECISELY WHETHER IT WAS PROVIDED TO THEM AT THE HEARING. I KNOW ULTIMATELY THEY DID SEE IT. IT MAY HAVE BEEN ONE OF THE THINGS AT THE HEARING. I JUST DON'T REMEMBER.

Q. I HAVE HANDED YOU WHAT HAS BEEN MARKED AS EXHIBIT 145.

DOES THAT JOG YOUR MEMORY AT ALL AS TO WHETHER THIS LETTER WAS ONE OF THE THINGS PROVIDED TO THE CITY COUNCIL?

A. DOES NOT.

Q. IT IS, ON ITS FACE, SOMETHING FROM U.S. FISH AND WILDLIFE, CORRECT?

[p. 404] A. APPEARS TO BE.

Q. IT IS SIGNED BY WILLIAM SHAKE?

A. YES.

Q. MR. SHAKE, IS HE THE SAME PERSON THAT SIGNED THE BIOLOGICAL OPINION?

A. HE IS.

Q. MR. SHAKE IS APPARENTLY RESPONDING TO AN INQUIRY FROM JOYCE STEVENS OF THE SIERRA CLUB, CORRECT?

A. THAT IS CORRECT.

Q. AND HE APPARENTLY WANTS TO CLARIFY WHAT THE STATUS OF THE BIOLOGICAL OPINION REALLY IS, IS THAT FAIR TO SAY?

A. CLARIFY.

Q. JUST READ IT.

A. I BELIEVE I STATES [sic] THE BASIS FOR THE OPINION.

Q. IF YOU WOULD LOOK AT THE SECOND PARAGRAPH. IT NOTES THAT THE CITY HAS A COPY OF THE OPINION AND:

"WE HOPE IT WILL NOT BE MISCONSTRUED AS APPROVAL OF THE PROJECT OR THE RESTORATION PLAN. OUR POSITION HAS BEEN CLEARLY STATED. THE PROJECT WILL DESTROY MOST, IF NOT ALL, OF THE SMITH'S BLUE BUTTERFLIES AND THEIR HOST PLANTS ON THE SITE AND THE FINAL RESTORATION PLAN WILL NOT LIKELY SUCCEED IN REPLACING LOST HABITAT OR

PRESERVING SMITH'S BLUE BUTTERFLIES AT THAT LOCATION."

THAT IS WHAT WAS TOLD TO THE CITY COUNCIL AT THE MAY [p. 405] HEARING AS THE MOST RECENT POSITION OF FISH AND WILDLIFE, IS THAT NOT CORRECT?

A. THIS LETTER WAS PROVIDED TO THEM. I'M ASSUMING YOU'RE CORRECT AT THAT HEARING AS AN EXPRESSION OF THE OPINION. YOU HAVE JUST READ A PARAGRAPH OUT OF THE LETTER. I THINK YOU NEED TO LOOK AT THE ENTIRE LETTER TO FIGURE OUT WHERE FISH AND WILDLIFE WAS COMING FROM.

Q. THAT IS BECAUSE THE REST OF THE LETTER EXPLAINS EXACTLY WHY IT WAS THAT FISH AND WILDLIFE HAD SAID THAT IN THEIR VIEW THIS PROJECT WOULD NOT ENDANGER THE SPECIES AS A WHOLE, CORRECT?

A. THAT IS CORRECT.

Q. IN FACT, IN THE VIEW OF FISH AND WILDLIFE, AT LEAST IN THE JURISDICTION OF FISH AND WILDLIFE, ONE COULD HAVE GONE IN THEIR [sic] WITH BULLDOZERS AND NOT HAD ANY RESTORATION PLAN WHATSOEVER?

A. THAT IS CORRECT.

Q. BUT THEY DID IN FACT, BECAUSE THEY DO HAVE, ASIDE FROM THEIR REGULATORY OBLIGATIONS, THEY HAVE AN INTEREST IN PROTECTING HABITATS WHERE POSSIBLE.



IN YOUR EXPERIENCE, ISN'T THAT TRUE?

A. CERTAINLY. THAT IS THE [sic] THROUGH THE RARE AND ENDANGERED SPECIES ACT.

Q. SO EVEN WHERE A RESTORATION PLAN IS NOT REQUIRED AS A MATTER OF FEDERAL LAW, THERE ARE CIRCUMSTANCES WHERE IT'S A [p.406] GOOD IDEA ANYWAY?

A. CERTAINLY.

Q. AND THEY IN THE EXERCISE OF THEIR BIGGER PICTURE GOAL OF PROTECTING HABITATS AND SPECIES, THEY WERE PREPARED TO COMMENT UPON THE RESTORATION PLAN IN HOPES THAT THEY COULD IMPROVE IT, FAIR TO SAY?

A. YES.

Q. I THINK YOU TESTIFIED THAT YOU VIEW THE MARCH '85 BIOLOGICAL OPINION TO BE THE APPROVAL FROM FISH AND WILDLIFE?

A. YES.

Q. YOU WERE DEPOSED IN THIS ACTION, WEREN'T YOU?

A. YES.

Q. JUST TO MAKE CLEAR, AT THAT DEPOSITION I WAS GIVEN THE CHANCE TO ASK YOU SOME QUESTIONS ABOUT THIS CASE AND YOU WERE PROVIDING ME WITH SOME ANSWERS?

A. CORRECT.

Q. AND YOU PROVIDED THOSE ANSWERS UNDER OATH?

A. CORRECT.

Q. AFTER THE DEPOSITION, YOU GOT A CHANCE TO GET THE BOOKLET BACK AND MAKE ANY CHANGES?

A. THAT'S CORRECT.

Q. AT THAT DEPOSITION - LET ME ASK YOU, IF YOU WOULD, TO TAKE A LOOK AT THE DEPOSITION AT PAGE 112, READING FROM LINE 11:

"Q. WHEN YOU GOT THE MARCH '85 LETTER THAT WE HAVE [p. 407] BEEN TALKING ABOUT, EXHIBIT 9, DID YOU VIEW THAT AS THE DEPARTMENT OFF [sic] INTERIOR'S APPROVAL OF THE RESTORATION PLAN?

A. NO. AS I POINTED OUT BEFORE, THERE WERE TWO ISSUES HERE: ONE WAS WHETHER THERE WAS A TAKING AND SIGNIFICANCE PURSUANT TO RARE AND ENDANGERED. THEY SAID 'NO.' THE SECOND WAS THEY WERE TAKING THE OPPORTUNITY IN THIS LETTER TO EXPRESS SOME OPINIONS ABOUT HOW, IF INDEED, THE PROJECT PROCEEDS, CHANGES MIGHT BE MADE."

AT THAT TIME WAS THAT QUESTION ASKED AND THAT ANSWER GIVEN.

A. YOU READ IT CORRECTLY, YES.

Q. AND IN FACT, IN THE BIOLOGICAL OPINION IN MARCH OF 1985, FISH AND WILDLIFE DID GIVE VARIOUS VIEWS AND SUGGESTIONS AS TO HOW THE RESTORATION PLAN COULD BE APPROVED?

A. INCLUDING THEIR STATEMENT IT HAD NO CHANCE OF SUCCEEDING.

Q. YOU TESTIFIED A BIT ABOUT THE MAY 1985 LETTER FROM FISH AND GAME.

A. THE ONE FROM MR. PARNELL?

Q. YES.

A. YES.

Q. IN THAT LETTER, EXHIBIT 88 - DO YOU HAVE THAT BEFORE YOU SOMEPLACE? I MAY HAVE. LET ME SEE. I DO.

IN THAT LETTER MR. PARNELL INDICATES THAT THEY AGREE [p. 408] THAT THIS PROJECT WOULD HAVE LITTLE CONSEQUENCE TO THE SMITH'S BLUE BUTTERFLY AS A WHOLE, CORRECT?

A. CORRECT.

Q. BUT ISN'T IT ALSO CORRECT THAT THE DEPARTMENT OF FISH AND GAME INDICATED IT IS NOT THE SPECIES AS A WHOLE, BUT RATHER THE POPULATION OF THE SPECIES, ANOTHER DEVELOPMENT SITE THAT REALLY IS AT ISSUE?

A. THAT WAS THEIR DETERMINATION, YES.

Q. THAT WAS THEIR VIEW?

A. YES.

Q. DIFFERENT VIEW FROM FISH AND WILD-LIFE?

A. CORRECT.

Q. IN FACT, THEY WENT ON TO NOTE THAT DOCTOR ARNOLD'S DATA AND FISH AND WILD-LIFE'S DATA INDICATES THE PROJECT COULD BE ADVERSE TO THE FUTURE POPULATIONS AT THE SITE IN SPITE OF THE SEVERAL MITIGATION EFFORTS PROPOSED IN THE REVISED PLAN?

A. YES, YOU READ IT CORRECTLY.

Q. IN FACT, HE CONCURS WITH DOCTOR ARNOLD'S FINDINGS?

A. YES.

Q. DO YOU KNOW WHAT FINDINGS HE WAS REFERRING TO THERE?

A. NO, I DO NOT. I'LL SPECULATE IT WAS THE SERIES OF COMMENTS IN THE VARIOUS LETTERS.

Q. RATHER THAN GO THROUGH ALL THE VARIOUS AND SUNDRY LETTERS FROM DOCTOR ARNOLD, IS IT FAIR TO SAY HE WAS FAIRLY STEADFAST IN HIS VIEWS THAT THE RESTORATION PLAN, THE ORIGINAL ONE AND [p. 409] AMENDED ONE, WOULD NOT BE SUCCESSFUL?

A. HE APPEARED NOT TO SUPPORT THE RESTORATION PLANS, PERIOD, AND THEREFORE DID NOT CHANGE HIS OPINION ABOUT THEM OVER TIME.

Q. DOCTOR ARNOLD, I THINK YOU MENTIONED ON DIRECT, HE WAS INVOLVED IN A RESTORATION PLAN INVOLVING THE SMITH'S BUTTERFLY, CORRECT?

A. THAT'S CORRECT.



Q. SO IN SOME CIRCUMSTANCES HE BELIEVED THAT RESTORATION PLANS COULD BE SUCCESSFUL, ISN'T THAT FAIR TO SAY?

A. I WOULD CONCLUDE THAT TO BE TRUE, BASED ON HIS PARTICIPATION AT SHAFRAN (PHONETIC), BUT NOT TRUE ON HIS COMMENTS CONCERNING PHILIPS.

Q. BECAUSE HE DISAGREED ON YOUR PROPOSALS?

A. HE DISAGREED WITH RESTORATION, PERIOD.

\* \* \*

BRIGHT-REDIRECT/JACOBSEN

[p. 423] Q. ON THE SECOND PAGE, HOWEVER, MR. SHAKE, THE HEAD OF FISH AND WILDLIFE, SAYS:

OUR OPINION ALSO SUGGESTED MODIFICATIONS TO THE PROJECT DESIGN THAT WE THINK APPROPRIATE TO PRESERVE THE BUTTERFLY IN ITS HABITAT ON THE SITE. DO YOU SEE THAT?

A. YES, I DO.

Q. "WITH THESE MODIFICATIONS, A RESTORATION PLAN ALONG THE LINES OF THAT PROPOSED COULD PROBABLY SUCCEED." CORRECT?

A. YES.

Q. DID YOU INCORPORATE THOSE SUGGESTED MODIFICATIONS FROM FISH AND WILDLIFE INTO YOUR RESTORATION PLAN?

A. YES. I QUALIFIED THAT EARLIER TODAY. IN GENERAL, WE DID THAT. THERE WERE ONE OR TWO PLACES WE COULD NOT DO IT BECAUSE OF CONFLICTING REQUIREMENTS, SUCH AS THE BERM ON THE EASTERN SIDE JUST MANDATED BY THE CITY TO CUT THAT ON THEIR VIEW IMPACTS FROM HIGHWAY 1.

Q. WHERE WAS THE BERM THAT YOU WERE REFERRING TO ON THE EASTERN SIDE? POINT IT OUT TO THE JURY.

[p. 424] A. YOU CAN SEE AN AREA RIGHT IN HERE. THIS ENTIRE AREA IN THROUGH HERE HAD TO BE BUILT UP AND A WALL, RETAINING WALL, BE PUT IN HERE STARTING AT THIS POINT AND COMING DOWN HERE TO HOLD THAT HEIGHT OF SAND SIX TO EIGHT FEET HIGH ABOVE THE GROUND LEVEL HERE (INDICATING). IT NEEDED TO BE THAT KIND OF SUPPORT, BECAUSE ANY KIND OF WIND ACTION WOULD CARRY THE SAND OVER THE TOP.

Q. WHY DID THE CITY REQUIRE AND INSIST ON THIS BERM ON THE EAST?

A. AS A MEANS OF OBSTRUCTING VIEW BY ANYBODY RIDING IN A CAR ON HIGHWAY 1.

Q. AND FISH AND WILDLIFE THOUGHT THAT THE RESTORATION PLAN WOULD HAVE A BETTER CHANCE OF SUCCESS WITHOUT THE BERM?

A. WITHOUT ANY MAN-MADE BERMS. THEY WOULD HAVE PREFERRED TO LEAVE THE BERMS THE WAY THEY WERE.

Q. DID YOU ASK THE CITY WHETHER YOU COULD ELIMINATE THIS BERM IN ORDER TO INCREASE THE CHANCE OF YOUR RESTORATION PLAN'S SUCCESS?

A. I DID NOT. MR. DAVIS DID.

Q. WHAT WAS THE CITY'S RESPONSE?

A. IT WAS ANY UNDERSTANDING THE CITY SAID NO.

Q. SO SOME OF THE MATTERS THAT WERE THOUGHT PROBLEMS WERE CITY REQUIREMENTS?

A. YES.

Q. BUT THE CITY WOULD NOT CHANGE; IS THAT CORRECT? THE CITY [p. 425] WOULD NOT CHANGE THAT?

A. WITH REGARD TO THIS VIEW VISTA BERM, IT WAS MANDATORY.

Q. MR. SHAKE ALSO REFERS TO THEY DON'T APPROVE RESTORATION PLANS. TECHNICALLY, DOES FISH AND WILDLIFE HAVE THE JURISDICTION TO APPROVE SOME LOCAL DEVELOPMENT PLAN?

A. NOT UNLESS THEY ARE THE LEAD AGENCY FOR THE PROJECT, AND THEY WERE NOT IN THIS CASE.

Q. THEY WERE A REVIEWING AGENCY?

A. THAT'S CORRECT.

Q. WHAT WAS THE BEST THEY COULD DO UNDER THEIR JURISDICTION?

A. THE SECTION 7 OPINION SAYING THAT THE LOSS OF THE HABITAT WAS NOT GOING TO JEOPARDIZE THE BUTTERFLY.

Q. THAT THEY GAVE YOU?

A. THAT'S CORRECT. AND ANY TAKING OF THE BUTTERFLY WOULD BE INCIDENTAL AND NOT SIGNIFICANT.

Q. THEY SAY IN THIS LETTER THAT THE SIERRA CLUB - THEY SAID THEIR LETTER SHOULD NOT BE MISCONSTRUED AS APPROVAL OF THE PROJECT, CORRECT?

A. THAT IS CORRECT.

Q. WERE THEY EVER ASKED TO APPROVE THE WHOLE PROJECT?

A. NO.

Q. BASED ON YOUR DISCUSSIONS WITH THEM, DID THEY LIKE THE IDEA OF BUILDING HERE?

A. THAT WAS NOT AN ISSUE OF CONCERN WITH THEM. IT NEVER CAME UP.

[p. 426] Q. LET ME TURN TO DOCTOR ARNOLD. DO YOU HAVE EXHIBIT 13 BEFORE YOU?

A. YES, I DO.

Q. THIS IS HIS LETTER WAY BACK IN 1982. DO YOU SEE UNDER - HE DOESN'T HAVE IT PAGINATED.



IT'S THE SECOND PAGE, UNDER "EVALUATION OF THE HABITAT" WAY BACK IN 82.

A. I DO.

Q. HOW DOES DOCTOR ARNOLD CHARACTERIZE THE PHILIPS SITE?

A. IT IS A DEGRADED SAND DUNE REMNANT. I NOTED ABOUT ONE-HALF OF THE CONSPICUOUS PLANT SPECIES CHARACTERISTIC OF SIMILAR DUNE REMNANTS TO THE NORTH."

Q. MR. YUHAS ASKED YOU ABOUT WHERE DOCTOR ARNOLD TALKED ABOUT THIS THING BEING A HIGHWAY OR PATHWAY. HE CHANGED HIS MIND. HOW?

A. HE ORIGINALLY THOUGHT HE WAS ON THE PHILIPS SITE, YOU REMEMBER, WHEN HE FOUND THE PARVIFOLIUM SPECIES OF BUCKWHEAT AND THE SMITH'S BLUE. HE WAS NOT. AND, THEREFORE, HIS OPINION ON THE SITE WAS NO LONGER GERMANE. HE RECOGNIZED THAT. HE TOLD US THAT HE UNDERSTOOD THAT. IT WAS ACTUALLY ADOPTED IN SOME OF THE SUBSEQUENT FISH AND WILDLIFE CORRESPONDENCE AS WELL.

Q. WOULD YOU LOOK AT PAGE 3 UNDER HIS FIRST SENTENCE RECOMMENDATIONS AND SUGGESTED MITIGATION ACTIONS?

A. I HAVE IT.

[p. 427] Q. WHAT IS HIS CONCLUSION ABOUT WHETHER THERE SHOULD BE DEVELOPMENT AT ALL ON THE SITE?

A. WELL, HE HAS AN INTERESTING ONE. IT SAYS:

"DUE TO THE SMALL SIZE OF THE SITE AND LIMITED NUMBER OF ERIOGONUM PLANTS, ANY FORM OF DEVELOPMENT IS LIKELY TO HAVE AN ADVERSE IMPACT ON THE BUTTERFLY'S LONG-TERM SURVIVAL."

Q. ANY FORM OF DEVELOPMENT?

A. YES.

Q. WAS THAT, IN GENERAL -

BASED ON YOUR DISCUSSIONS WITH HIM, HIS VIEW WAS THAT ANY FORM OF DEVELOPMENT WAS GOING TO HAVE AN ADVERSE IMPACT?

A. I THINK ANY DEVELOPMENT.

Q. HE GOES ON TO SAY:

"HOWEVER, IF NOT DEVELOPMENT OCCURS, THE SITE MAY OTHERWISE BE DAMAGED TO PRECLUDE OCCUPATION BY THE SMITH'S BLUE BUTTERFLY."

Q. LET ME REFER YOU TO THAT SECOND PARAGRAPH, AND I QUOTE:

"FOR THESE REASONS I RECOMMEND THAT IF DEVELOPMENT IS APPROVED, IT SHOULD BE LIMITED TO THE WESTERN PORTION OF THE DUNES."

DOCTOR ARNOLD, AS FAR BACK AS '82 SAYS:

"IF DEVELOPMENT IS APPROVED, IT SHOULD BE LIMITED TO [p. 428] THE WESTERN PORTION OF THE DUNES, I.E., FROM

THE LEVEL OF ABOUT SEAFOAM AVENUE TO THE OCEAN. THE AREA EAST OF SEA-FOAM SHOULD BE LEFT" -

LET ME SEE. I LOST MY PLACE. IT'S GETTING LATE IN THE DAY.

"THE AREA EAST OF SEAFOAM TO DEL MONTE BOULEVARD SHOULD BE LEFT AS A DUNE PRESERVE."

DO YOU SEE THAT STATEMENT?

A. I DO.

Q. DOCTOR ARNOLD WANTED TO REVERSE THIS, DIDN'T HE?

A. DOCTOR ARNOLD ONLY WANTED TO HAVE DEVELOPMENT TO THE WEST AND DO NO DEVELOPMENT ON THE EASTERN SIDE AT ALL. THAT IS THE SIDE RIGHT THERE. ONLY DEVELOPMENT ON THAT SIDE. NOTHING ON THE EAST AT ALL.

Q. BUT HE ALSO WANTED TO KEEP IT OUT TOWARD THE SEAWARD SIDE OF THE LAND AND LEAVE THE BACK SIDE UNDEVELOPED?

A. CORRECT.

Q. BASED ON YOUR LENGTHY CONVERSATIONS AND DISCUSSIONS AND KNOWLEDGE OF CITY OF MONTEREY POLICIES AND COASTAL COMMISSION POLICIES IN YOUR DISCUSSIONS WITH THEM, WHAT IS YOUR OPINION OF WHETHER THE COASTAL COMMISSION AND CITY OF MONTEREY WOULD HAVE ALLOWED THIS OWNER TO DEVELOP ITS CONDOMINIUM UNITS ALONG THE BEACH HERE?

A. NEVER WOULD HAVE BEEN ALLOWED.

Q. IF THE COASTAL COMMISSION AND IF THE CITY OF MONTEREY ARE [p. 429] GOING TO REQUIRE THIS OWNER TO DEVELOP LANDWARD OF THE SEWER LINE EASEMENT, IS THERE ANY WAY OF SITING THESE UNITS AND DEVELOPING IN THIS BOWL AREA TO STAY OUT OF VIEW AND ALL THOSE OTHER CONSTRAINTS YOU HAVE DESCRIBED AND STILL DO WHAT DOCTOR ARNOLD WANTS TO DO?

A. NO.

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JACK VAN ZANDER-DIRECT/JACOBSEN

[p. 463] Q. IN TERMS OF YOUR DISCUSSIONS WITH CITY OFFICIALS BEFORE THE SEPTEMBER '84 APPROVAL AND THE DOCUMENTATION YOU GAVE TO THE CITY, DID THAT SHOW THAT THIS WHOLE BOWL AREA WAS GOING TO HAVE TO BE GRADED TO CONSTRUCT THE PROJECT?

A. YES.

[p. 464] Q. DID YOU KNOW AT THE TIME IN YOUR DISCUSSIONS WITH THE CITY OFFICIALS CONCERNING THE GRADING THAT THERE WAS SOME BUCKWHEAT PLANTS IN THIS AREA AS WELL?

A. YES.

Q. BEFORE THE APPROVAL IN SEPTEMBER '84 OF THIS PUTTING UNITS IN THIS BOWL AREA AND LEAVING THE REST OF IT FOR THE BEACH AND THE



BUTTERFLIES DOWN HERE, DID ANYONE AT THE CITY SAY YOU CAN'T PUT ANY DEVELOPMENT IN HERE IF YOU'RE GOING TO BUILD OVER A BUCKWHEAT PLANT?

A. NO.

Q. DID PUBLIC WORKS KNOW THERE WERE BUCKWHEAT PLANTS YOU WERE GOING TO HAVE TO GRADE OVER?

A. I ASSUME SO. THEY WERE AT SEVERAL OF THE HEARINGS.

Q. HOW ABOUT THE PLANNING DEPARTMENT?

A. CERTAINLY.

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DANIEL CONSIDINE - DIRECT/JACOBSEN

[p. 512] Q. YOU HEARD SOME TESTIMONY CONCERNING THE EVENTS THAT LED UP TO THE SEPTEMBER '84 APPROVAL.

WAS DEL MONTE DUNES PARTNERSHIP INVOLVED IN TERMS OF MONITORING AND COMMUNICATING WITH MR. DAVIS, DOCTOR BRIGHT AND OTHERS BEFORE THIS SEPTEMBER '84 APPROVAL?

A. ABSOLUTELY. WE WERE INVOLVED IN MONITORING AS EARLY AS 1981.

Q. THEREFORE, IN SEPTEMBER OF 1984, WHEN THE CITY APPROVED THIS SITE MAP, THE PARTNERSHIP THEN DECIDED TO PURCHASE THE PROPERTY?

A. THAT'S CORRECT.

Q. AT THAT POINT, IN SEPTEMBER OF 1984, DID DEL MONTE DUNES HAVE TO PURCHASE THE PROPERTY AND PAY THESE MILLIONS OF DOLLARS?

A. NO, NOT AT ALL. IT WAS A CONDITION TO EXERCISING THE OPTION.

Q. SO DEL MONTE COULD HAVE WALKED AWAY FROM IT?

A. THAT'S CORRECT.

Q. IF DEL MONTE HAD KNOWN IN '84 THAT THE CITY OF MONTEREY, SOMETIME DOWN THE LINE, WAS GOING TO FIND THAT YOU COULDN'T BUILD THAT BECAUSE THEY WOULDN'T ALLOW YOU TO GRADE THE HOMES, WOULD DEL MONTE HAVE BOUGHT THAT PROPERTY?

A. NO, SIR.

Q. WHAT WAS DEL MONTE DUNES INVESTMENT EXPECTATION IN BUYING THIS PROPERTY AFTER THE SEPTEMBER '84 SITE PLAN APPROVAL?

[p. 513] A. WELL, THE REASON WE WAITED UNTIL THE SITE PLAN WAS APPROVED IS BECAUSE WE FELT THAT WAS THE LAST HURDLE TO DEVELOPMENT OF THE PROPERTY.

AND THE REASON FOR WAITING UNTIL THAT POINT WAS TO BE ASSURED THAT WE HAD A PIECE OF PROPERTY THAT COULD BE DEVELOPED, AND WITH THE DEVELOPMENT WE HAD A PROFIT EXPECTATION THAT WITH THE MONIES SPENT, THE

DEVELOPMENT OF THE PROPERTY ACHIEVED, HOMES BUILT AND SOLD, THE PARTNERSHIP WOULD EARN A PROFIT ON ITS INVESTMENT.

Q. AFTER YOU PURCHASED THIS PROPERTY - WHEN I SAY "YOU", I MEAN THE DEL MONTE DUNES PARTNERSHIP - PURCHASED IT IN LATE 1984 AFTER THIS SITE PLAN APPROVAL, WE'VE HEARD VARIOUS TESTIMONY BY MR. DAVIS AND DOCTOR BRIGHT AND NOW MR. VAN ZANDER ABOUT WHAT THOSE PEOPLE AND THEIR FIRMS DID AFTER THIS SITE PLAN WAS APPROVED WITH THE ARCHITECTURAL REVIEW COMMITTEE AND THE LIKE.

WHO WAS PAYING FOR THEIR SERVICES AT THAT POINT?

A. AT WHICH POINT IN TIME?

Q. AFTER THE PURCHASE OF THE PROPERTY IN LATE '84?

A. THE PARTNERSHIP WAS. THE PARTNERSHIP WAS PAYING ALL THREE OF THE FIRMS.

Q. AFTER THIS JUNE '86 DENIAL, I TAKE IT YOU WERE NOTIFIED IMMEDIATELY?

A. THAT'S CORRECT.

Q. DID YOU MAKE ANY EFFORTS, YOU MEANING THE PARTNERSHIP, TO [p. 514] SELL THIS 37.5 ACRES?

A. YES.

Q. AND WHAT EFFORTS OR STEPS DID YOU TAKE TO TRY TO SELL THIS PROPERTY?

A. AFTER THE CITY COUNCIL ACTION, WE REALLY WENT BACK TO THE DRAWING BOARDS AND TRIED TO DETERMINE WHAT, IF ANYTHING, WE COULD DO RELATIVE TO DEVELOPMENT HERE.

COMMON SENSE TOLD US THERE WAS NO WAY WE WOULD BE ABLE TO DEVELOP THIS PROPERTY. SO THE DECISION WAS MADE WE SHOULD TRY TO MITIGATE OUR LOSSES, SELL THE PROPERTY AND THEN MOVE ON TO OTHER THINGS.

IN THE PROCESS OF TRYING TO SELL THE PROPERTY, WE TALKED TO MR. DAVIS, WHO IS VERY WELL KNOWN IN THE AREA.

Q. PAUL DAVIS WHO TESTIFIED HERE?

A. YES. WE ASKED HIM FOR HIS OPINION IN MARKETING. WE ALSO TALKED WITH MERRILL LYNCH, WHO WAS AN INVESTOR IN BORG WARNER. AND MERRILL LYNCH SENT IN FROM NEW YORK A TEAM OF REAL ESTATE EXPERTS WHO IN TURN BROUGHT IN A SECOND AREA FIRM LOCATED IN MIAMI CALLED BROTHERS PROPERTY. THEY REVIEWED ALL THE MATERIAL AND DECIDED TO MARKET THE PROPERTY, AND IN FACT THEY DID MARKET THE PROPERTY.

MOST OF THE ACTIVITY THAT WAS GENERATED AS A RESULT OF OUR ACTIVITIES REALLY CAME OUT OF MONTEREY AND THAT PENINSULA AREA WHERE THIS WAS CERTAINLY VERY HIGH PROFILE, VERY VISIBLE AND EVERYBODY NEW [sic] SORT OF WHAT WAS GOING ON.



[p. 515] WE HAD A NUMBER OF DEVELOPERS CONTACT MR. DAVIS, PAUL DAVIS, AND HE WOULD RELATE FACTS TO THEM. HE IN TURN WOULD TELL THEM IF THEY ARE INTERESTED IN CONTINUING FURTHER, TO CONTACT ME.

I SPOKE WITH A NUMBER OF THE INTERESTED PARTIES. IN SOME CASE THEY WENT TO BROTHERS PROPERTY, WHICH WAS THE REAL ESTATE FIRM THAT WE WERE USING FOR MARKETING PURPOSES. I ALSO TALKED TO ITT REAL ESTATE, WHICH IS LOCATED IN CHICAGO, WHICH IS PART OF ITT CORPORATION. I TALKED TO HURON INVESTORS LOCATED IN CHICAGO, BECAUSE THEY OWN SEVERAL HOTELS IN THE MONTEREY AREA.

Q. LET ME STOP YOU THERE. AS A RESULT OF THESE EFFORTS, REGARDLESS OF WHETHER IT WAS MR. DAVIS OR MERRILL LYNCH OR WHATEVER, IS IT FAIR TO SAY YOU WERE TRYING TO MARKET THIS PROPERTY NATIONWIDE?

A. CORRECT.

Q. AS A RESULT OF THESE EFFORTS IN THE YEARS FOLLOWING THE DENIAL, WERE YOU PERSONALLY CONTACTED BY PEOPLE WITH AN INTEREST IN THE PROPERTY?

A. YES, I WAS CONTACTED.

Q. I'M REFERRING HERE TO PEOPLE FROM THE PRIVATE SECTOR, PRIVATE DEVELOPERS, WITH AN INTEREST IN THE PROPERTY?

A. YES.

Q. WHICH AT THAT POINT, FOR LACK OF A BETTER WORD, THE POINT MAN FOR THE PARTNERSHIP?

[p. 516] A. YES.

Q. SO INQUIRES FROM PEOPLE WITH INTEREST WOULD COME THROUGH YOU?

A. YES.

Q. WOULD YOU, WHEN PEOPLE CALLED, TELL THEM ABOUT THE HISTORY OF THIS PROPERTY?

A. YES.

Q. WITHOUT GOING INTO THE DETAILS OF EACH AND EVERY ONE, AFTER DISCUSSING WITH THESE PEOPLE WHO WERE INTERESTED IN THE PROPERTY, TELLING THEM THE HISTORY OF IT, WAS ANYBODY WILLING TO PURCHASE THE PROPERTY FOR MONEY?

A. NO.

Q. WHAT WERE THEY WILLING TO DO?

A. WELL, THE TYPICAL PERSON COMING FORWARD WAS SOMEONE WHO WANTED US TO GIVE THEM AN OPTION ON THE PROPERTY FOR SOME PROLONGED PERIOD OF TIME SO THEY COULD EVALUATE WHAT THEY MIGHT DO WITH THE PROPERTY. THESE PEOPLE WERE NOT PREPARED TO ENTER INTO A CONTRACT FOR PURCHASE OF THE PROPERTY.

WHAT THEY WERE LOOKING FOR WAS A LONG-TERM OPTION, BECAUSE FRANKLY THEY HAD - THE

INFORMATION AND HISTORY AS RELATED HERE, AND ALTHOUGH IT'S A WONDERFUL PIECE OF PROPERTY, THERE WAS OBVIOUSLY A BIG CONCERN IN EVERYBODY'S MIND AS WHETHER IT COULD EVER BE DEVELOPED.

Q. WHOEVER HAD INTEREST FROM THE PRIVATE SECTOR, WAS ANYBODY EVER WILLING TO PUT UP ANY CASH UNCONDITIONALLY?

[p. 517] A. NO. EVERY OFFER, AND WE RECEIVED A NUMBER OF WRITTEN OFFERS, THEY WERE ALWAYS OPTIONS, NEVER ANY CASH INVOLVED, AND SOME POINT IN THE FUTURE, AND THAT POINT IN THE FUTURE WAS NORMALLY CITY APPROVAL OF THE PROJECT.

Q. AT SOME -

A. SOME DISTANT POINT. IN SOME CASES THE OPTIONS WOULD BE FOR SIX OR NINE MONTHS, BUT THEY WERE RENEWABLE THREE OR FOUR TIMES.

Q. ALSO AFTER THE DENIAL, DID ANYONE FROM A GOVERNMENT AGENCY CONTACT YOU ABOUT THIS PROPERTY?

A. IN 1988 I RECEIVED A LETTER FROM STATE OF CALIFORNIA COASTAL CONSERVANCY ADVISING ME THAT THEY HAD SOME INTEREST IN THE PROPERTY AND ASKING ME IF WE WERE INTERESTED IN SELLING THE PROPERTY.

Q. EITHER AT THAT TIME OR SOME LATER TIME IN YOUR DISCUSSING WITH THE STATE OF CALIFORNIA, WHAT DID THEY WANT IT FOR? DID THEY WANT TO DEVELOP IT?

A. NO. THEY WANTED TO USE IT AS A PARK.

Q. THE ENTIRE PROPERTY?

A. ENTIRE PARCEL.

Q. DID YOU ULTIMATELY SELL THE PROPERTY TO THE STATE OF CALIFORNIA?

A. YES, WE DID. WE SOLD ALL BUT A SMALL PORTION THAT CURRENTLY IS UNDER OPTION TO THE STATE WHICH WE BELIEVE WILL EVENTUALLY BE SOLD TO THEM.

\* \* \*

[p. 520] Q. OF THIS PURCHASE PRICE OF FOUR AND A HALF MILLION DOLLARS, WAS THAT NEGOTIATED WITH THE STATE?

A. IT WAS VERY DIFFICULT TO NEGOTIATE WITH THE STATE BECAUSE THEY WERE VERY ADAMANT. THEY SAID WE CAN'T PAY ANY MORE THAN APPRAISED VALUE.

Q. WHOSE?

A. THEIRS. THEY WOULD SEND OUT THEIR APPRAISER WHO WOULD DO AN EVALUATION OF THE PROPERTY, AND THAT WOULD DETERMINE WHAT THE PURCHASE PRICE WAS.

Q. THEN WAS A TAKE IT OR LEAVE IT PROPOSITION?



A. YES.

Q. IN YOUR DISCUSSIONS WITH THESE STATE REPRESENTATIVES, WERE YOU MADE KNOWN THAT THE STATE OF CALIFORNIA HAD THE POWER OF CONDEMNATION?

A. YES.

Q. DID THEY MAKE YOU AWARE OF WHAT USE THEY WANTED FOR THE PROPERTY?

A. YES, THEY DID.

Q. WHAT USE WAS THAT?

A. IT WAS OPEN LANDS. IT WAS GOING TO BE A PARK, JUST A GREAT, BIG EMPTY LOT, A PARK.

Q. ON AN ARM'S LENGTH TRANSACTION WITH A PRIVATE DEVELOPER COMING IN TO BUY THIS, WOULD YOU HAVE SOLD IT FOR FOUR AND A HALF MILLION DOLLARS?

[p. 521] A. NO, NOT AT ALL.

Q. AT THE TIME YOU WERE TALKING TO THE STATE OF CALIFORNIA REPRESENTATIVES, WERE THERE - WHO WAS GOING TO BE PAYING THE MONEY TO ACQUIRE THIS PROPERTY FOR THE GOVERNMENT?

A. WELL, ACCORDING TO THE CONSERVANCY, BECAUSE I DID ASK THAT QUESTION BECAUSE IT WAS RELEVANT TO US -

MR. YUHAS: YOUR HONOR, I OBJECT. IT'S HEARSAY.

THE COURT: SOUNDS LIKE IT. I WILL SUSTAIN THE OBJECTION.

Q. (BY MR. JACOBSEN) WAS IT CONTEMPLATED THERE BE VARIOUS GOVERNMENTAL AGENCIES CONTRIBUTING TO THE PURCHASE PRICE OF FOUR AND A HALF MILLION?

A. YES.

MR. YUHAS: OBJECTION. HEARSAY.

THE COURT: SOUNDS TO ME LIKE THE SAME QUESTION. SUSTAINED.

Q. (BY MR. JACOBSEN) DID IT COME TO YOUR ATTENTION THE CITY OF MONTEREY WAS GOING TO CONTRIBUTE TO THE PURCHASE PRICE OF THIS FOR A PARK?

A. YES.

Q. HOW DID IT COME TO YOUR ATTENTION?

A. CAME TO ME THROUGH TWO SOURCES.

MR. YUHAS: I OBJECT, YOUR HONOR, AS TO ONE BUT NOT THE OTHER.

THE COURT: DO YOU UNDERSTAND WHICH ONE HE IS [p. 522] TALKING ABOUT?

THE WITNESS: YES. I RECEIVED A CALL FROM BILL CONNORS, WHO IDENTIFIED HIMSELF AS AN ATTORNEY IN THE CORPORATE COUNSEL'S OFFICE IN THE CITY OF MONTEREY. AND HE ADVISED ME THAT THE CITY WAS GOING TO BE

MAKING A CONTRIBUTION TOWARDS THE PURCHASE OF THE PARCEL AND THAT HE WAS CONCERNED ABOUT THAT BECAUSE IN OUR LAWSUIT AGAINST THE CITY, WE HAD ALLEGED THAT THE CITY WITHHELD ZONING BECAUSE THEY WANTED THIS TO REMAIN A PARK, UPLANDS AND THAT THEIR CONTRADICTION COULD BE SEEN AS DAMAGING INFORMATION IN THE LAWSUIT.

AND HE ASKED ME SPECIFICALLY AND SAID HOW CAN WE POSSIBLY MAKE A CONTRIBUTION TOWARDS THE PURCHASE PRICE UNDER THOSE CIRCUMSTANCES? I TOLD HIM, FRANKLY, I DIDN'T KNOW. AND THAT WAS, FRANKLY, ABOUT THE EXTENT OF OUR CONVERSATION TO SUMMARIZE. BUT IT'S FACTUAL.

Q. WAS THIS PERSON AN EMPLOYEE EMPLOYED BY THE CITY OF MONTEREY?

A. THAT IS THE WAY HE IDENTIFIED HIMSELF AN ATTORNEY WORKING FOR THE CORPORATE COUNSEL'S OFFICE FOR THE CITY OF MONTEREY.

Q. DID THIS CONVERSATION OCCUR AFTER YOU HAD ENTERED INTO THE OPTION WITH THE STATE OF CALIFORNIA?

A. YES.

Q. DID MR. CONNORS IN THIS CONVERSATION TELL YOU ANYTHING TO THE EFFECT OF BEFORE YOU SELL IT OR RECONSIDER, DON'T SELL IT [p. 523] TO THE STATE BECAUSE, AFTER ALL, IF YOU COME BACK IN, WE'LL GIVE YOU DEVELOPMENT ON THIS LAND?

THE COURT: SORRY. IF THAT IS A QUESTION, I DON'T UNDERSTAND.

MR. JACOBSEN: VERY WELL. I WILL REPHRASE IT.

Q. WE HEARD MR. DAVIS TESTIFY ABOUT NOT RESUBMITTING APPLICATIONS AFTER THIS DENIAL. OTHERS TALKED ABOUT HOW IT COULDN'T BE DONE.

AT THE TIME THAT THIS CITY EMPLOYEE, WHO WAS AN ATTORNEY FOR THE CITY, CALLED YOU IN THE MIDDLE OF YOUR NEGOTIATIONS WITH THE STATE, DID HE AT ANY TIME SAY DON'T SELL TO THE STATE BECAUSE YOU CAN COME BACK AND GET SOME DEVELOPMENT APPROVALS FOR THIS PROPERTY?

A. NO, HE NEVER SUGGESTED THAT.

Q. DID HE OR ANYONE ELSE DURING THIS PERIOD OF TIME YOU WERE NEGOTIATING GO WITH THE STATE OF CALIFORNIA FOR THE SALE OF THE PROPERTY FOR PARK PURPOSES CONTACT YOU AND DISCOURAGE YOU FROM SELLING TO THE STATE OF CALIFORNIA?

A. NO.

Q. DID ANYONE FROM THE CITY OF MONTEREY, THIS ATTORNEY OR ANYONE ELSE, DURING THE TIME PERIOD YOU ARE TALKING TO THE STATE OF CALIFORNIA TO SELL THE PROPERTY FOR PARK PURPOSES, DID ANYONE CONTACT YOU AND INVITE YOU OR ADVISE YOU TO COME BACK WITH



ANOTHER DEVELOPMENT PROPOSAL INSTEAD OF SELLING TO THE STATE?

[p. 524] A. NO.

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FLOYD CLEVINGER - DIRECT/JACOBSEN

[p. 709] Q. IN LATE 1991, IF IN FACT YOUR HIGHEST AND BEST USE HAD BEEN RESIDENTIAL MULTI-FAMILY, AS YOU HAD IN THE BEFORE CONDITION, WHAT WOULD THIS PROPERTY HAVE BEEN WORTH IN YOUR OPINION?

A. I THINK IT WOULD HAVE BEEN WORTH AROUND NINE OR \$10 PER SQUARE FOOT.

Q. HOW MUCH WOULD THAT HAVE TRANSLATED TO TOTAL?

A. OH, NINE OR \$10 MILLION.

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WILLIAM WOJTKOWSKI - DIRECT/YUHAS

[p. 805] SO COULD YOU JUST DESCRIBE BRIEFLY THE RELATIVE POSITIONS OF THE CITY AND THE COASTAL COMMISSION STAFF REGARDING THE ACCESS ISSUE AT THIS TIME?

A. IN SPRING OF '84?

Q. YES.

A. THE CITY, AS I MENTIONED, HAD REQUIRED AN ENVIRONMENTAL IMPACT REPORT DONE FOR

THIS PHILLIPS PETROLEUM PROJECT. IN THAT ENVIRONMENTAL IMPACT REPORT THERE IS A TRAFFIC ANALYSIS.

THERE WAS A LOT OF TESTIMONY. FOR THAT REASON, AND A VARIETY OF OTHER REASONS, THE CITY FELT THAT THE BEST ACCESS WOULD BE FROM DEL MONTE AVENUE. THAT WOULD BE THE PRIMARY ACCESS.

SINCE THE SECONDARY ACCESS WAS NEEDED FOR THIS PROJECT AND ALSO DESIRABLE FOR THE EXISTING DEVELOPMENT, THERE WAS AN EMERGENCY ACCESS THAT WAS NEEDED.

WE LOOKED AT OTHER POSSIBILITIES. AND TO THE RIGHT WAS THE STATE PROPERTY. AND THE STATE WAS GOING THROUGH THEIR [p. 806] OWN MASTER PLANNING, AND THEY - AT THAT TIME THEY WERE NOT TOO RECEPTIVE TO HAVING ACCESS THROUGH THEIR PROPERTY.

TO THE NORTH WAS THE WATER. THERE WAS NO POSSIBLE WAY OF GOING TO THE NORTH.

AND SO IF ONE ACCESS WAS TO THE SOUTH, WE FELT THAT THE ONLY OTHER POSSIBLE WAY WAS TO THE WEST. WE LOOKED AT VARIOUS ALTERNATIVES THROUGH THAT EXISTING SUBDIVISION, PUBLIC WORKS DEPARTMENT, FIRE DEPARTMENT - I REMEMBER LOOKING AT THESE OTHER STREETS, DOWN CREST AND SEAFOAM. AND IT WAS FELT THAT THE MOST FEASIBLE ACCESS WAS THROUGH TIDE AVENUE.

THERE WAS A PLAN ALREADY ON THE AVENUE, WHICH INDICATED THE CITY SOMETIME PREVIOUSLY, I THINK IN THE SIXTIES, HAD INDICATED THAT THAT WOULD BE - THAT WOULD BE EITHER A PRIMARY ROAD OR AN EMERGENCY ROAD.

Q. WHAT WAS THE COASTAL COMMISSION POSITION ON THE ACCESS ISSUE?

A. THE COASTAL COMMISSION WAS SAYING ALMOST JUST THE REVERSE OF US. THEY WERE SAYING THAT THE PRIMARY ACCESS SHOULD BE THROUGH TIDE AVENUE. AND IF THAT DIDN'T WORK, THE SECONDARY ACCESS SHOULD BE THROUGH THE STATE PROPERTY.

I'M SORRY. THE PRIMARY ACCESS SHOULD BE THROUGH TIDE AVENUE. IF THAT DIDN'T WORK, THE PRIMARY ACCESS SHOULD THEN BE THROUGH THE STATE PROPERTY.

IF ALL ELSE FAILS, AND THERE IS A REAL GOOD ACCESS ANALYSIS, THEN, AND ONLY THEN, WOULD YOU COME THROUGH ON DEL [p. 807] MONTE.

IT IS MY UNDERSTANDING THAT WAS BASED BECAUSE THEY WERE CONCERNED ABOUT THIS HABITAT, THAT A PUBLIC ROAD WOULD IMPACT THAT HABITAT THAT WAS IN THAT AREA.

Q. NOW, DID THE CITY ENGAGE IN SOME EFFORT TO TRY TO CONVINCE THE COASTAL COMMISSION THAT THE ACCESS PROPOSAL FAVORED BY THE CITY SHOULD BE APPROVED BY THE COMMISSION?

A. YES.

Q. CAN YOU DESCRIBE THOSE EFFORTS, PLEASE.

A. WE, AGAIN, STAFF INVITED THE COASTAL COMMISSION STAFF TO COME DOWN THERE AND TO LOOK AT THESE VARIOUS ALTERNATES. AND, UNDERSTAND, WE NEEDED TWO MEANS OF ACCESS, AND THERE WERE ONLY FOUR POSSIBLE MEANS OF ACCESS. ONE OF THEM WAS THE WATER. SO THERE ARE REALLY ONLY THREE POSSIBLE MEANS OF ACCESS.

AND THAT TO THE RIGHT WAS THE STATE PROPERTY, AND THEY WEREN'T ALLOWING US. SO WE ONLY HAD AT THAT TIME, WE THOUGHT, TWO VIABLE MEANS OF ACCESS.

WE WALKED THROUGH THE SITE WITH THEM. WE GAVE THEM - PREPARED A DOCUMENT OF ALL OF OUR VARIOUS DEPARTMENT ANALYSIS, AS WELL AS THE PREVIOUS TRAFFIC ANALYSIS, TO TRY TO SUBSTANTIATE THAT.

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[p. 820] Q. WHAT ACCESS ROUTES WERE BEING PROPOSED AS PART OF THE 190-UNIT PROPOSAL?

A. THEY WERE THE SAME ACCESS ROUTES THAT WERE CONTAINED IN THE CITY'S LAND USE PLAN, AND THAT IS THE PRIMARY ACCESS WOULD BE SOUTH TO DEL MONTE AVENUE, AND THEN THERE WOULD BE A SECONDARY, AN EMERGENCY ACCESS, THROUGH TIDE AVENUE. THAT EMERGENCY ACCESS WOULD BE GATED OFF. IT WOULD



NOT BE USED ON A REGULAR BASIS; ONLY IF THERE WAS SOME KIND OF CATASTROPHE.

Q. THERE HAS BEEN TESTIMONY ABOUT THIS, BUT JUST SO WE ARE CLEAR, FOR THE DEVELOPER TO REACH THAT SECONDARY ACCESS, WOULD IT HAVE BEEN NECESSARY TO ACQUIRE PROPERTY FROM THE NEXT DOOR NEIGHBOR?

A. IT WOULD BE NECESSARY TO EITHER ACQUIRE THE PROPERTY, OR YOU CAN ACQUIRE SOMETHING CALLED AN EASEMENT, WHICH MEANS THAT THE OWNERSHIP STILL STAYS WITH THE PRESENT OWNER, BUT HE [p. 821] ALLOWS YOU THE RIGHT TO CROSS HIS PROPERTY. SO YOU WOULD EITHER HAVE TO ACQUIRE THE PROPERTY OR AN EASEMENT.

Q. NOW, IN THE COURSE AND EVOLUTION OF THIS 190-UNIT DEVELOPMENT PLAN PREVIOUSLY, HAD YOU HAD ANY DISCUSSIONS WITH ANYBODY REPRESENTING THE DEVELOPER CONCERNING HOW THIS EASEMENT OR ACCESSWAY WOULD BE ACQUIRED?

A. THE ACCESSWAY ON TIDE AVENUE?

Q. YES.

A. NO. I HAD NOT.

Q. ARE YOU AWARE OF ANYONE AT THE CITY TELLING THE PLAINTIFF THAT THE CITY WOULD CONDEMN THAT ACCESSWAY, IF NECESSARY, PRIOR TO THE JANUARY OR THE SEPTEMBER '84 HEARING?

A. NO, I WAS NOT AWARE OF THE TYPE OF DISCUSSION OF THAT EFFECT.

Q. AT THE HEARING BEFORE THE CITY COUNCIL, WERE THERE ANY DISCUSSIONS OR MENTIONS OF THE POSSIBILITY THAT THE CITY MIGHT OR WOULD CONDEMN THIS PROPERTY?

A. NO, NO DISCUSSIONS AT ALL ABOUT THAT ISSUE.

Q. HOW WAS IT THAT STAFF EXPECTED THAT THE DEVELOPER WOULD BE ABLE TO ACQUIRE THIS ACCESSWAY?

A. SIMPLY BY OFFERING - NEGOTIATING AND OFFERING MONEY TO THE PROPERTY OWNER. AND AGAIN, HE COULD EITHER OFFER TO BUY THE PROPERTY OUTRIGHT OR JUST AN EASEMENT.

Q. NOW, AT THE TIME THE CITY COUNCIL WAS CONSIDERING THE SEPTEMBER SITE PLAN, WAS THE CITY COUNCIL ASKED TO APPROVE THE [p. 822] HABITAT PROTECTION MEASURES?

A. NO, IT WAS NOT.

Q. WHY NOT?

A. WELL, THERE WAS ONLY A DRAFT HABITAT PLAN AND ALSO - THAT WAS BEING CIRCULATED TO VARIOUS EXPERTS TO VIEW. IT WAS REALLY IN A DRAFT TYPE OF STAGE. IT WAS NOT A FINAL RESTORATION PLAN.

Q. WAS THE RESTORATION PLAN THAT WAS RECEIVED, WAS THAT PREPARED BY DOCTOR BRIGHT?

A. I BELIEVE IT IS, YES.

Q. YOU SAID IT WAS BEING REVIEWED BY EXPERTS.

CAN YOU BE MORE SPECIFIC AS TO WHO WAS BEING ASKED TO REVIEW THIS RESTORATION PLAN?

A. IT WAS AT LEAST BEING REVIEWED BY FISH AND GAME, WHICH IS A STATE AGENCY, FISH AND WILDLIFE, WHICH IS A FEDERAL AGENCY, AND I BELIEVE WE ALSO SENT A COPY OF IT TO DOCTOR ARNOLD. DOCTOR ARNOLD WAS INVOLVED IN THE DRAFT EIR.

Q. BETWEEN THE TIME -

DO YOU RECALL WHEN THIS RESTORATION PLAN WAS FIRST AVAILABLE FOR CIRCULATION?

A. NOT PRECISELY. I WOULD THINK THE SUMMER OF 1984, BUT I'M NOT POSITIVE.

Q. DID THE CITY OBTAIN AT LEAST SOME TYPE OF PRELIMINARY INPUT FROM FISH AND WILDLIFE PRIOR TO THE SEPTEMBER HEARING ON THE 190-UNIT PROPOSAL?

[p. 823] A. I DON'T RECALL SPECIFICALLY. I THINK THERE WAS SOME DISCUSSION. A LOT OF THAT EARLY STAGE WAS BEING HANDLED BY OUR - MY PLANNER, HAYWARD NORTON.

Q. I HAVE HANDED YOU WHAT HAS BEEN MARK [sic] AS EXHIBIT 64 RECEIVED IN EVIDENCE IN THIS CASE.

THIS IS A LETTER DATED AUGUST 22, 1984 FROM THE FISH AND WILDLIFE SERVICE?

A. THAT'S CORRECT.

Q. IF YOU WOULD LOOK ON THE SECOND PAGE, DOES THIS LETTER PROVIDE AT LEAST SOME PRELIMINARY COMMENTS ON THE RESTORATION PLAN THAT HAD BEEN SENT TO FISH AND WILDLIFE FOR REVIEW?

A. YES, IT DOES.

Q. IN THE PARAGRAPH AT THE TOP, WOULD YOU PLEASE READ THAT PARAGRAPH FOR THE JURY?

A. "IN REGARD TO THE GENERAL GOALS LISTED ON PAGES 2 AND 3 OF THE RESTORATION PLAN -"

Q. READ MORE SLOWLY.

A. YES.

"IN REGARD TO THE GENERAL GOALS LISTED ON PAGES 2 AND 3 OF THE RESTORATION PLAN, WE SUPPORT THOSE THAT ELIMINATE THE EXOTIC ICE PLANTS AND THOSE THAT PROVIDE POTENTIAL HABITAT AREAS FOR THE SMITH'S BLUE BUTTERFLY. WE DO NOT NECESSARILY AGREE WITH THE PLANS TO ACHIEVE THE GOALS, ESPECIALLY THOSE INVOLVING THE REMOVAL AND REPLACEMENT OF SAND AND [p. 824] THOSE THAT CONTROL THE NATURAL MOVEMENT OF SAND. WE CAN ALSO SUPPORT THE PLAN TO PROHIBIT OFF-ROAD VEHICLES IN THE AREA TO PROTECT THE SMITH'S BLUE BUTTERFLY AND ITS FOOD



PLANT. PLANS RELATING TO RELOCATING PLANTS SUCH AS," AND I WILL SPELL THIS, E-R-I-O-G-O-N-U-M, AND THEN IT HAS "SPP. HAVE LITTLE LIKELIHOOD FOR SUCCESS."

Q. DO YOU RECALL WHETHER THE CITY HAD ALSO -

THE COURT: WHAT EXHIBIT WAS THAT?

MR. YUHAS: EXHIBIT 64.

Q. DO YOU RECALL WHETHER PRIOR TO THE CITY COUNCIL'S CONSIDERATION OF THE 190-UNIT PROPOSAL THAT IT HAD RECEIVED INPUT FROM DOCTOR ARNOLD?

A. YES, I BELIEVE THERE WAS A LETTER SENT BY DOCTOR ARNOLD TO THE CITY.

Q. WITHOUT GOING INTO THE SPECIFICS, DO YOU RECALL WHETHER DOCTOR ARNOLD WAS FAVORABLY OR DISFAVORABLY DISPOSED TOWARD THE RESTORATION PLAN?

A. I BELIEVE DOCTOR ARNOLD'S LETTER RAISED SOME CONCERNS ABOUT THE ADVERSE IMPACTS OF THE RESTORATION PLAN.

Q. DID THE CITY GIVE DOCTOR BRIGHT THE OPPORTUNITY TO RESPOND TO THESE COMMENTS?

A. YES. ANY LETTERS OF THIS TYPE THAT WE WOULD RECEIVE WE WOULD SEND THEM TO PAUL DAVIS AND DOCTOR BRIGHT.

Q. AS OF THE TIME THAT THE CITY COUNCIL WAS CONSIDERING THE [p. 825] 190-UNIT PROPOSAL, DID STAFF CONSIDER THAT FISH AND WILDLIFE HAD AT THAT TIME APPROVED THE RESTORATION PLAN?

A. NO WAY HAD THEY APPROVED IT.

Q. HOW WAS THE ISSUE OF HABITAT PROTECTION TO BE ADDRESSED IN THE CONTEXT OF THE SITE PLAN ISSUES FACING THE CITY COUNCIL?

A. STAFF HAD PROPOSED A CONDITION IN THE WRITTEN STAFF REPORT TO THE COUNSEL THAT - AND I'M NOT SURE OF THE PRECISE WORDING, BUT I THINK IT SAID PRIOR TO THE FINAL MAP THAT THIS PLAN, RESTORATION PLAN, BE REMOVED AND APPROVED BY AT LEAST TWO AGENCIES, FISH AND GAME, FISH AND WILDLIFE, AS WELL AS THE CITY OF MONTEREY.

Q. WAS THIS PROPOSED CONDITION MADE KNOWN TO THE DEVELOPER?

A. YES.

Q. HOW WAS IT MADE KNOWN TO THE DEVELOPER?

A. AGAIN, WE TRANSMIT ALL THESE WRITTEN STAFF REPORTS THAT WE SENT TO THE CITY COUNCIL, ALWAYS SEND A COPY TO THE APPLICANT AND ANY OTHER AFFECTED PARTIES.

Q. WHY WAS IT THE CITY WAS SEEKING INPUT FROM FISH AND WILDLIFE ON THE RESTORATION PLAN?

A. THERE WAS NOT THAT LEVEL OF EXPERTISE EITHER AT THE STAFF OR PLANNING COMMISSION OR CITY COUNCIL LEVEL TO COMPLETELY EVALUATE THIS TYPE OF SCIENTIFIC ISSUE.

Q. IN THE CONTEXT OF THE DEL MONTE BEACH LAND USE PLAN, DID FISH AND WILDLIFE HAVE A ROLE UNDER THAT PLAN IN THE EVALUATION OF RESTORATION PLANS?

[p. 826] A. YES. BOTH, I THINK, FISH AND WILDLIFE AND FISH AND GAME, THE COASTAL COMMISSION AND THE CITY CONCURRED THAT THEY WOULD BE INVOLVED WITH THE REVIEW, AND I THINK THEIR WORDING WAS "REVIEW AND CONCUR WITH ANY HABITAT RESTORATION PLAN."

Q. DID THE CITY ALSO INCLUDE IN ITS CONDITION REVIEW BY THE DEPARTMENT OF FISH AND GAME?

A. YES, IT DID.

Q. DID THE DEVELOPER - AT THIS TIME THE DEVELOPER WAS PONDEROSA?

A. YES.

Q. DID ANYONE AT PONDEROSA OBJECT TO INCLUDING AS PART OF THE SITE PLAN APPLICATION THIS TYPE OF CONDITION?

A. NO, THEY DID NOT.

Q. DID DOCTOR BRIGHT EXPRESS ANY VIEWS AS TO WHETHER IT WAS APPROPRIATE TO SEEK INPUT AND APPROVAL FROM U.S. FISH AND WILDLIFE AND FISH AND GAME?

A. YES. I BELIEVE HE SUPPORTED THAT TYPE OF REVIEW.

Q. MR. WOJTKOWSKI, I HAVE HANDED YOU WHAT HAS BEEN MARKED AS EXHIBIT 6. IF YOU WOULD TAKE A MOMENT TO LOOK AT THAT AND TELL THE JURY WHAT THIS IS.

A. THIS IS A LETTER FROM DOCTOR BRIGHT TO BILL FELL, MEMBER OF MY STAFF, DATED AUGUST 9, 1984, REGARDING CORRESPONDENCE ON RESTORATION PLAN.

Q. I ASKED YOU EARLIER WHETHER DOCTOR BRIGHT HAD HAD THE OPPORTUNITY TO RESPOND TO FISH AND WILDLIFE AND DOCTOR ARNOLD.

[p. 827] IS THIS HIS RESPONSE TO THEIR COMMENTS?

A. YES. FIRST SENTENCE SAYS THAT, THAT HE HAS REVIEWED THE CORRESPONDENCE FROM DOCTOR ARNOLD AND FROM FISH AND WILDLIFE.

Q. IF YOU WOULD LOOK ON PAGE 4 OF THIS EXHIBIT AT THE BOTTOM.

DOES DOCTOR BRIGHT AT THAT POINT SUGGEST THAT A CONDITION BE ADDED TO THE SITE PLAN APPROVAL?

A. YES, HE DOES.

Q. DOES HIS PROPOSAL ALSO INCLUDE REVIEW OF THE RESTORATION PLAN BY FISH AND WILDLIFE AND FISH AND GAME?



A. I SEE FISH AND WILDLIFE - YES. ACTUALLY, IT SAYS:

"NECESSARY PERMIT FROM FISH AND WILDLIFE AND SAID RESTORATION PLAN SHALL INCLUDE RESOLUTIONS OF THE CONCERNS OF THE DEPARTMENT OF FISH AND GAME AND DEPARTMENT OF PARKS AND RECREATION AND THE CALIFORNIA COASTAL COMMISSION."

Q. THIS MAY BE OBVIOUS, BUT JUST SO IT IS CLEAR, WHAT WAS THE PURPOSE OF INCLUDING THIS HABITAT PROTECTION CONDITION AS PART OF THE SITE PLAN APPROVAL PROCESS?

A. WELL, WE DID NOT KNOW THE COMPLETE SCOPE OF THIS RESTORATION PLAN, AND IT MAY IMPACT THE SITE PLAN AND REQUIRE SOME CHANGES. AND THE REASON FOR THE SPECIFIC CONDITION, AGAIN, IS THAT THE CITY DID NOT HAVE THE EXPERTISE TO REVIEW IT. SO WE ASKED THAT OUTSIDE AGENCIES, STATE AND FEDERAL AGENCIES, REVIEW AND APPROVE IT, AS WELL AS THE CITY OF MONTEREY.

[p. 828] Q. AT THE TIME THAT THE SITE PLAN WAS BEING CONSIDERED BY THE CITY, AND BY THE SITE PLAN I MEAN THE 190-UNIT SITE PLAN PROPOSED BY THE APPLICANT, WAS IT KNOWN WHETHER THIS HABITAT PROTECTION CONDITION COULD BE SATISFIED IN THE CONTEXT OF THAT SPECIFIC SITE PLAN?

A. NO, IT WAS NOT FULLY KNOWN. IT WAS HOPED THAT IT COULD BE.

I DO RECALL THAT THE CITY STAFF MADE SOME SUGGESTIONS ON THE CIRCULATION PATTERN THAT REDUCED SOME OF THE IMPACTS OF INCOMING ROADS AND PROTECTED MORE OF THE HABITAT. AND THE APPLICANT AGREED WITH THAT. SO IT WAS HOPED. BUT NO, IT WAS NOT KNOWN. THAT'S WHY WE PUT THAT CONDITION OF APPROVAL.

Q. WAS THE POSSIBILITY RAISED THAT MEETING THAT CONDITION MIGHT REQUIRE THAT THE SITE PLAN BE MODIFIED IN SOME RESPECT?

A. YES, IT WAS.

Q. HOW WAS THAT MADE KNOWN TO THE APPLICANT?

A. I THINK ACTUALLY IT WAS PART OF THE WORDING OF THE DRAFT STAFF CONDITION IN THE REPORT THAT THIS MAY RESULT IN CHANGES TO THE SITE PLAN.

Q. DID THE CONDITION ALSO INDICATE WHAT WOULD HAPPEN TO HE - WHAT WOULD HAVE TO HAPPEN THEREAFTER IF IN FACT CHANGES TO THE SITE PLAN WERE REQUIRED?

A. THEN THE SITE PLAN WOULD HAVE TO GO BACK THROUGH THE REVIEW PROCESS.

[p. 829] Q. AGAIN, WAS THE DEVELOPER AWARE OF THAT POSSIBILITY?

A. YES, HE WAS.

Q. AGAIN, HOW WAS HE AWARE OF THAT?

A. HE RECEIVED THE REPORT IN WRITING AHEAD OF THE MEETING.

\* \* \*

[p. 830] Q. THE HEARING ON THIS 190-UNIT SITE, THAT WAS ON SEPTEMBER 13, 1984?

A. I BELIEVE IT WAS SEPTEMBER 13.

Q. THIS WAS A PUBLIC HEARING?

A. THAT'S CORRECT.

Q. WHO MADE THE PRESENTATION FROM THE CITY STAFF PERSPECTIVE TO THE CITY COUNCIL AT THAT PUBLIC HEARING?

A. I DID.

Q. IN THE COURSE OF YOUR PRESENTATION, DID YOU DISCUSS THE HABITAT CONDITION AND HOW IT FIT INTO THE OVERALL PROCESS?

A. THAT'S CORRECT. I REMEMBER COUNCIL MEMBERS ASKING WAS THE HABITAT PLAN APPROVED, AND I REMEMBER RESPONDING NO, IT WAS NOT, BUT IT'S COVERED BY THIS CONDITION OF APPROVAL.

Q. WAS THERE A DISCUSSION AS TO WHAT MIGHT HAPPEN IF IN ORDER TO SATISFY THE HABITAT CONDITION THE SITE PLAN MIGHT HAVE TO BE MODIFIED?

A. YES. THERE WAS SOME DISCUSSION THAT IF IT RESULTED IN CHANGES TO THE SITE PLAN, THEN THE SITE PLAN WOULD HAVE TO GO [p. 831] BACK AND BE REVIEWED BY THE CITY.

Q. WAS THERE ANY DISCUSSION IN THE COURSE OF THE CITY COUNCIL DELIBERATIONS CONCERNING HOW THE HABITAT CONDITION SHOULD BE ADDRESSED IN FUTURE CONSIDERATION OF THIS DEVELOPMENT?

A. YES, THERE WAS. THERE WAS SOME DISCUSSION THAT SINCE THIS MIGHT CHANGE THE SITE PLAN OR HAD A POSSIBILITY OF CHANGING THE SITE PLAN, RATHER THAN REQUIRING IT AT THE FINAL MAP THAT THAT - I THINK IT WAS CONDITION NUMBER 3 - THAT CONDITION BE MODIFIED TO SAY PRIOR TO SUBMITTAL OF THE TENTATIVE MAP, BECAUSE THE INTENT WAS AGAIN THAT THIS - IF YOU WORKED OUT ALL THESE CONDITIONS IN THE SITE PLAN, THEN THE TENTATIVE MAP SHOULD GO VERY SMOOTHLY. THERE SHOULDN'T BE SIGNIFICANT CHANGES AT THE TENTATIVE MAP LEVEL. SO IT WAS CHANGED AT THE COUNCIL MEETING.

Q. I WANT TO MAKE SURE I UNDERSTAND THIS. PRIOR TO THE COUNCIL MEETING, AT WHAT STAGE DID THE STAFF RECOMMENDATION CONTEMPLATE THAT THE DEVELOPER WOULD HAVE TO OBTAIN APPROVAL OF THE RESTORATION PLAN?

A. IT WAS AFTER THE TENTATIVE MAP APPROVAL. I BELIEVE THE PRECISE WORDING WAS PRIOR TO THE FINAL MAP.

Q. AS A RESULT OF THE DELIBERATIONS BY THE CITY COUNCIL, HOW DID THAT CHANGE?



A. IT WAS CHANGED TO SAY PRIOR TO THE SUBMITTAL OF THE TENTATIVE MAP.

Q. FROM A PLANNING PERSPECTIVE, WHAT IS THE SIGNIFICANCE OF [p. 832] THAT CHANGE?

A. AGAIN, THERE WERE CHANGES TO THE SITE PLAN. RATHER THAN THE DEVELOPER SPENDING A LOT OF ENGINEERING TIME AND DEVELOPMENT TO DO A TENTATIVE MAP THAT MAY SUBSTANTIALLY CHANGE, THIS WOULD ALLOW THE SITE PLAN, IF IT MET THOSE CONDITIONS, OR IF IT WAS REVISED, THEN THE TENTATIVE MAP WOULD GO THROUGH VERY SMOOTHLY.

\* \* \*

[p. 845] Q. AM I CORRECT THE FIRST PUBLIC HEARING ON THE TENTATIVE MAP FOR THIS PROJECT, THE 190 PROJECT, WAS ON MAY 6, 1986?

A. THAT'S CORRECT.

Q. PRIOR TO THAT HEARING, WAS A STAFF REPORT PREPARED?

A. YES, IT WAS.

Q. DID THAT STAFF REPORT INCLUDE A RECOMMENDATION AS TO WHAT STAFF FELT SHOULD BE DONE WITH THE APPLICATION?

A. YES.

THE COURT: SORRY. YOUR QUESTION ABOUT FISH AND WILDLIFE, YOU NEVER HAD A LETTER OR HADN'T UP UNTIL THAT POINT IN TIME?

THE WITNESS: WE HAD RECEIVED LETTERS FROM FISH AND WILDLIFE, BUT WE HAD NOT RECEIVED THEIR FINAL RESPONSE AS OF THE DATE OF THE STAFF REPORT. SO WE WERE WAITING FOR THEIR FINAL RESPONSE ON THE FINAL RESTORATION PLAN.

THE FINAL RESTORATION PLAN, I BELIEVE, WAS COMPLETED BY DOCTOR BRIGHT, AT LEAST THE ONE WE HAVE, DATED FEBRUARY OF 1986. SO THAT WAS AFTER THE PLANNING COMMISSIONS DECISION. AND WE WERE WAITING FOR THESE TWO AGENCIES TO REVIEW AND [p. 846] COMMENT ON THAT.

THE COURT: WHICH TWO, FISH AND GAME AND FISH AND WILDLIFE?

THE WITNESS: THAT'S CORRECT.

Q. (BY MR. YUHAS) MR. WOJTKOWSKI, I HAVE HANDED YOU WHAT IS EXHIBIT 143.

CAN YOU TELL ME WHAT THAT IS?

A. THIS IS ANOTHER STAFF REPORT FROM MYSELF TO THE CITY COUNCIL.

Q. IS THIS THE STAFF REPORT THAT INCLUDES THE STAFF RECOMMENDATION AS TO THE 190-UNIT APPLICATION FOR APPROVAL?

A. THAT'S CORRECT.

Q. ON THE FIRST PAGE UNDER HABITAT RESTORATION PLAN, DOES THAT REFLECT THE RECOMMENDATIONS STAFF WAS MAKING?

A. ON THE FIRST PAGE?

Q. YES.

A. THE FIRST PAGE IS SOME OF THE ISSUES, THE MAJOR ISSUES, TO BE CONSIDERED.

Q. IF YOU WOULD READ FOR THE JURY THAT PARAGRAPH, PLEASE.

A. WHICH PARAGRAPH?

Q. THE PARAGRAPH UNDER HABITAT RESTORATION PLAN.

A. YES.

"ATTACHED FOR YOUR REVIEW IS A SUMMARY PREPARED BY PLANNING SERVICES MANAGER NORTON OF DATA AND CORRESPONDENCE PERTAINING TO THE HABITAT RESTORATION [p. 847] PLAN. UNFORTUNATELY, THE CONFUSION RESULTING FROM DIFFERENT EXPERT OPINIONS HAS NOT ONLY BEEN RESOLVED, BUT TO SOME DEGREE HAS BEEN MAGNIFIED. NOT ONLY IS THERE DISAGREEMENT ON THE HABITAT RESTORATION, BUT THERE IS ALSO DISAGREEMENT ON THE LOCATION OF EXISTING HABITAT. BECAUSE THIS DECISION COULD HAVE MAJOR RAMIFICATIONS ON THE SITE PLAN, THIS PROJECT SHOULD NOT PROCEED UNTIL THIS ISSUE IS RESOLVED."

Q. AM I CORRECT THAT YOUR RECOMMENDATION IS INCLUDED ON THIS AND OTHER ISSUES ON THE SECOND PAGE?

A. YES.

Q. AGAIN, YOUR RECOMMENDATION IS THE MATTER BE DENIED?

A. THAT'S CORRECT.

\* \* \*

[p. 848] Q. LET'S TALK ABOUT THE INFORMATION AVAILABLE TO THE CITY COUNCIL REGARDING SOME OF THE CONDITIONS THAT WERE INCLUDED IN THE SITE PLAN THAT WAS APPROVED IN SEPTEMBER OF '84. WE HAVE TALKED ABOUT ONE OF THE CONDITIONS WAS THE SITE PLAN - THAT THE RESTORATION PLAN BE REVIEWED AND APPROVED BY FISH AND WILDLIFE, CORRECT?

A. YES, THAT'S CORRECT.

Q. I HAVE HANDED YOU WHAT IS EXHIBIT 145 WHICH HAS BEEN RECEIVED IN EVIDENCE IN THIS CASE. [p. 849] WHAT IS THIS?

A. THIS IS A LETTER FROM FISH AND WILDLIFE SIGNED BY WILLIAM SHAKE, AND IT'S ADDRESSED TO JOYCE STEVENS, COASTAL COMMITTEE OF THE SIERRA CLUB.

Q. I NOTICE IT'S DATED MAY 5, 1986, SHORTLY BEFORE THE DATE OF THE FIRST PUBLIC HEARING.

WAS THIS LETTER MADE AVAILABLE TO THE CITY COUNCIL IN THE COURSE OF THAT HEARING?

A. THAT'S CORRECT.

Q. WHO IS JOYCE STEVENS?

A. SHE'S A REPRESENTATIVE OF THE SIERRA CLUB.



Q. DO YOU RECALL WHETHER SHE WAS AT THE PUBLIC HEARING ON MAY 6?

A. I BELIEVE SHE WAS, AND SHE SPOKE TO THE COUNCIL.

Q. IF YOU LOOK AT THE SECOND PARAGRAPH OF THAT LETTER, THERE IS A REFERENCE IN THE FIRST SENTENCE TO THE BIOLOGICAL OPINION TO THE VETERANS ADMINISTRATION.

DO YOU KNOW WHAT THAT REFERS TO?

A. YES.

Q. WHAT DOES THAT REFER TO?

A. IT'S THIS REQUIREMENT, I GUESS, ONE FEDERAL AGENCY RESPONDING TO ANOTHER FEDERAL AGENCY WHERE IF THIS RESTORATION PLAN OR IN THIS PROJECT, I MEAN, WILL JEOPARDIZE THE CONTINUED EXISTENCE OF A LISTED SPECIES, AND IT'S SBB OR SMITH'S BLUE BUTTERFLY.

[p. 850] Q. YOU HAD MADE REFERENCE THIS AFTERNOON TO A THICK LETTER YOU HAD SEEN WRITTEN BY FISH AND WILDLIFE TO VIRGIL COCHRAN (PHONETIC), OR SOMETHING.

IS THAT WHAT YOU UNDERSTOOD THE BIOLOGICAL OPINION TO BE?

A. YES. THAT WAS THE LETTER DATED SOMETIME IN THE SPRING OF 1985.

Q. IN THE SECOND PARAGRAPH OF THIS LETTER AM I CORRECT THAT FISH AND WILDLIFE COMMENTS UPON THE RESTORATION PLAN BEING PROPOSED BY THE PLAINTIFF?

A. YES, IT DOES.

Q. WOULD YOU READ FOR THE JURY THAT PARAGRAPH BEGINNING WITH THE CITY OF MONTEREY?

A. THE SECOND PARAGRAPH?

Q. IN THE SECOND PARAGRAPH BEGINNING WITH THE CITY OF MONTEREY. THE CITY OF MONTEREY HAS A COPY OF THAT OPINION.

A. SORRY. THAT IS IN THE FIRST PARAGRAPH.

"THE CITY OF MONTEREY HAS A COPY OF THAT OPINION AND WE HOPE IT WILL NOT BE MISCONSTRUED AS APPROVAL OF THE PROJECT OR THE RESTORATION PLAN. OUR POSITION HAS BEEN CLEARLY STATED. THE PROJECT WILL DESTROY MOST IF NOT ALL OF THE SMITH'S BLUE BUTTERFLIES AND THEIR HOST PLANTS ON THE SITE, (PAGE 6) AND THE FINAL RESTORATION PLAN WILL NOT LIKELY SUCCEED IN REPLACING LOST HABITAT OR PRESERVING SMITH'S BLUE [p. 851] BUTTERFLIES AT THAT LOCATION, (PAGE 10).

THE COURT: THAT IS FISH AND GAME OR FISH AND WILDLIFE?

MR. YUHAS: FISH AND WILDLIFE.

THE COURT: WHAT EXHIBIT?

MR. YUHAS: EXHIBIT 145.

THE COURT: IS THAT THE LAST COMMUNICATION FROM FISH AND WILDLIFE BEFORE THE MEETING?

MR. YUHAS: YOU ANTICIPATE THE QUESTION.

Q. THIS WAS DATED THE DAY BEFORE THE PUBLIC HEARING; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. BETWEEN THE DATE OF THIS LETTER AND THROUGH THE PUBLIC HEARING IN JUNE OF 1986, WERE ANY ADDITIONAL LETTERS RECEIVED FROM FISH AND WILDLIFE?

A. NO, NOT TO MY KNOWLEDGE.

\* \* \*

[p. 855] Q. THANK YOU. NOW, THE SEPTEMBER 1984 CONDITIONAL SITE PLAN APPROVAL ALSO REQUIRED INPUT AND APPROVAL FROM THE DEPARTMENT OF FISH AND GAME?

[p. 856] A. THAT'S CORRECT.

Q. BY THE WAY, WAS THERE ANY REPRESENTATIVE OF FISH AND WILDLIFE AT THE MAY OR JUNE HEARINGS?

A. NO, THERE WAS NOT.

Q. WAS THERE A REPRESENTATIVE FROM THE DEPARTMENT OF FISH AND GAME?

A. YES, THERE WAS.

Q. DO YOU RECALL WHO THAT WAS?

A. IT WAS A MR. JOHNSON.

Q. PRIOR TO THIS HEARING, HAD YOU HAD OCCASION TO MEET OR DEAL WITH MR. JOHNSON?

A. I PERSONALLY HADN'T.

(PAUSE IN PROCEEDINGS)

Q. I HAVE HANDED YOU EXHIBIT 147.

CAN YOU TELL THE MEMBERS OF THE JURY WHAT THIS ENTIRE DOCUMENT IS?

A. THESE ARE THE CITY COUNCIL MINUTES OF THE MAY 6, 1986 MEETING.

Q. IF YOU WOULD DIRECT YOUR ATTENTION TO PAGE 10 OF THESE MINUTES TO THE TOP PARAGRAPH, DO THESE MINUTES AT THAT POINT REGARD REPORT ON COMMENTS MADE BY MR. JOHNSON FROM THE DEPARTMENT OF FISH AND GAME?

A. YES, THEY DO.

Q. DO THOSE COMMENTS RELATE TO THE ADEQUACY OF THE RESTORATION PLAN?

[p. 857] A. YES, THEY DO.

Q. WOULD YOU PLEASE READ FOR THE JURY THE PORTION OF THE MINUTES THAT DEAL WITH MR. JOHNSON'S COMMENTS?

A. YES.



"MR. MICHAEL JOHNSON, CALIFORNIA STATE DEPARTMENT OF FISH AND GAME, STATED THAT THE DEPARTMENT HAS PROBLEMS WITH THE PROJECT, POINTED OUT THE SMITH'S BLUE BUTTERFLY WAS AND IS ENDANGERED, THAT NO PRESERVATION PLAN EXISTS FOR THE SITE, AND THE RESTORATION PLAN HAS NOT BEEN APPROVED."

Q. DO THESE MINUTES ACCURATELY RECORD THE COMMENTS MADE BY MR. JOHNSON AT THAT PUBLIC HEARING?

A. YES, THEY DO.

\* \* \*

[p. 865] Q. LET'S SWITCH GEARS A LITTLE BIT TO THE ACCESS ISSUE.

PRIOR TO THE PUBLIC HEARINGS, DID ANYONE REALLY OBJECT TO THE CHOICE OF THE ACCESS ROUTES THAT WERE BEING CONSIDERED?

A. YES, THERE WERE SOME OBJECTIONS. OBVIOUSLY, THE COASTAL COMMISSION STAFF. THIS MR. MOM (PHONETIC) WHO OWNS PART OF A SMALL PARCEL ADJACENT TO THE PONDEROSA SITE, HE RAISED SOME SERIOUS CONCERNS.

Q. WAS THERE ANY DISAGREEMENT BETWEEN THE CITY AND ITS STAFF AND THE DEVELOPER AS TO WHAT THE APPROPRIATE ACCESS ROUTES SHOULD BE?

A. NO, I DO NOT BELIEVE SO.

Q. IN THE COURSE OF THE INFORMATION PROVIDED TO THE CITY STAFF AND THEN PROVIDED TO THE CITY COUNCIL, DID THE PLAINTIFF PROVIDE ANY INFORMATION CONCERNING ITS EFFORTS TO ACQUIRE THE EASEMENT THAT WOULD BE NEEDED TO ACCOMPLISH THE SECONDARY ACCESS?

A. THROUGH TIDE AVENUE?

Q. YES.

A. NO, THERE WAS NO INFORMATION AT ALL.

Q. DID HE PROVIDE ANY INFORMATION CONCERNING THE EXPECTED COSTS OF ACQUIRING THAT EASEMENT?

A. NO, HE DID NOT.

Q. DID HE PROVIDE ANY INFORMATION AS TO HOW HE WOULD HANDLE THE REIMBURSEMENT OF THE CITY IF THE CITY WERE TO CONDEMN THAT [p. 866] PROPERTY?

A. NO, IT WAS NEVER BROUGHT UP.

Q. DID HE PROVIDE ANY INFORMATION SUGGESTING THAT HE IN FACT EXPECTED THE CITY TO CONDEMN THAT PROPERTY FOR IT?

A. NO. TO THE BEST OF MY KNOWLEDGE, IT WAS NEVER MENTIONED.

Q. NOW, AT THE CITY COUNSEL HEARING, WAS IT DISCUSSED WITH THE CITY COUNCIL MEMBERS THAT THE CITY MIGHT BE EXPECTED TO CONDEMN THIS PROPERTY TO PROVIDE THIS NEEDED SECONDARY ACCESS?

A. YES, THAT WAS BROUGHT UP.

Q. DID MEMBERS OF THE CITY COUNCIL EXPRESS CONCERN ABOUT USING THIS POWER OF CONDEMNATION?

A. THEY DID VERY MUCH.

Q. THE CITY DOES HAVE THE POWER TO CONDEMN PROPERTY?

A. THEY DO.

Q. WHAT IS POWER OF EMINENT DOMAIN?

A. THE POWER OF EMINENT DOMAIN IS THE POWER OF AN AGENCY TO ACQUIRE PROPERTY FROM AN UNWILLING SELLER. THEY CAN FORCE A SALE UPON PROPERTY.

Q. SINCE YOU HAVE BEEN WITH THE CITY, HAS THE CITY EXERCISED ITS POWER OF EMINENT DOMAIN?

A. I CANNOT RECALL ANY INSTANCE WHERE WE DID THAT.

Q. ARE THEIR SITUATIONS WHERE THE CITY HAS HAD TO ACQUIRE PROPERTY FOR ITS OWN PURPOSES?

A. YES. FOR WIDENING THE STREETS.

Q. IN THOSE SITUATIONS, HOW HAS IT GONE ABOUT ACQUIRING THE [p. 867] PROPERTY?

A. THE CITY TRIES TO NEGOTIATE WITH THE PROPERTY OWNER.

Q. DOES THE CITY HAVE ANY POLICIES, FORMAL POLICIES, REGARDING THE EXERCISE OF THE POWER OF EMINENT DOMAIN?

A. THERE IS A FORMAL POLICY IN THE CITY CHARTER THAT PROHIBITS THE CITY FROM ACQUIRING PRIVATE PROPERTY FOR PRIVATE PURPOSES WITHOUT A VOTE OF THE PEOPLE IN THE CITY.

Q. WOULD THAT SPECIFIC POLICY HAVE APPLICATION TO THIS PARTICULAR SITUATION?

A. NO. BECAUSE THIS WOULD BE ACQUIRING AN EASEMENT OR THE RIGHT-OF-WAY FOR A PUBLIC STREET OR A PUBLIC EMERGENCY ACCESS.

Q. IN YOUR DEALINGS WITH STAFF WITHIN THE CITY AND THE CITY COUNCIL ON OTHER OCCASIONS, WHAT GENERALLY WAS THE ATTITUDE OF THE CITY TOWARDS EXERCISING ITS POWER OF EMINENT DOMAIN?

MR. JACOBSEN: I OBJECT. THAT CALLS FOR SPECULATION.

THE COURT: YES. THAT IS PRETTY GENERAL. I WILL SUSTAIN THE OBJECTION.

Q. (BY MR. YUHAS) WAS THERE ANY FORMAL POLICY WITHIN THE CITY THAT WOULD PRECLUDE THE CITY FROM EXERCISING THE POWER OF EMINENT DOMAIN IN THE PRESENT CASE IF THE CITY COUNCIL CHOSE TO DO SO?

A. NO, NOT TO MY KNOWLEDGE.



Q. BASED UPON YOUR EXPERIENCE WITH THE CITY, ITS POLICIES, PROCEDURES AND REGULATIONS, WHAT TYPES OF INFORMATION WOULD BE [p. 868] IMPORTANT TO THE CITY COUNCIL IN DETERMINING WHETHER TO EXERCISE THAT POWER?

A. THEY WOULD LOOK AT THE COST OF THAT, I BELIEVE, LOOK AT OTHER ALTERNATIVES TO THAT PROCESS, WHAT MEANS OF PAYING FOR IT, LEGAL COSTS, WE ALSO ACQUISITION COSTS.

Q. WAS ANY OF THAT INFORMATION PROVIDED TO THE CITY COUNCIL AT EITHER THE MAY OR JUNE HEARINGS?

A. NO.

\* \* \*

[p. 872] CAN YOU TELL THE JURY WHAT EXHIBIT 151 IS?

A. THIS IS A RESOLUTION OF THE CITY COUNCIL 86-96, AND IT'S ADOPTING FINDINGS IN SUPPORT OF DENIAL OF THE 190-UNIT PROJECT.

Q. WHO WITHIN THE CITY ACTUALLY DRAFTS THE FINDINGS?

A. AT THIS POINT WHERE THE COUNCIL GAVE SOME DIRECTION, IT WOULD BE THE CITY ATTORNEY'S OFFICE. THE CITY ATTORNEY.

Q. DID YOU PARTICIPATE IN THE PROCESS OF DRAFTING THE FINDINGS?

A. YES, I WOULD REVIEW AND COMMENT ON THEM.

Q. IF YOU WOULD LOOK AT THE FIRST FINDING, THAT'S THE FINDING RELATING TO THE SAND RELOCATION AND GRADING ISSUE.

A. YES.

Q. THAT MAKES REFERENCE TO CERTAIN ENVIRONMENTAL IMPACTS, CORRECT?

A. YES, IT DOES.

Q. WHAT ENVIRONMENTAL IMPACTS ARE BEING ADDRESSED BY THIS FINDING?

MR. JACOBSEN: OBJECTION. THAT CALLS FOR SPECULATION AND NO FOUNDATION.

THE COURT: I THINK IT HAS FOUNDATION. I WILL OVERRULE THE OBJECTION.

THE WITNESS: AS I MENTIONED BEFORE, IT REALLY DIDN'T DEAL WITH THE GRADING. IT DEALT WITH THE CONSEQUENCES OF THE GRADING, THE SAND RELOCATION AND HOW MANY CUBIC YARDS [p. 873] AND WHETHER IT HAD TO BE TAKEN OFF SITE, AND IF THEY WERE GOING TO STAY ON SITE, WHAT WOULD BE THE RAMIFICATIONS OF THAT.

Q. ASIDE FROM YOUR EXPERIENCE BASED UPON BEING THERE, DID THE FINDINGS THEMSELVES -

LET ME TAKE IT A STEP BACK: DOES THE REFERENCE TO ENVIRONMENTAL IMPACTS IN FINDING

NUMBER 1 RELATE TO IMPACTS ON THE BUTTERFLY HABITAT?

A. NO. AS I MENTIONED, IT DEALT WITH THE SAND RELOCATION ISSUES AND THE VIEW IMPACTS THAT MIGHT RESULT FROM THAT, OR IF YOU HAD TO TAKE THE SAND OFF SITE, THE CONSEQUENCES OF THAT.

Q. OTHER THAN YOUR RECOLLECTION AND BEING INVOLVED AT THAT TIME, IS THERE ANYTHING WITHIN THESE FINDINGS THAT DEMONSTRATES THAT THE ENVIRONMENTAL IMPACTS REFERENCED HERE ARE NOT IMPACTS DEALING WITH THE BUTTERFLY HABITAT?

A. WELL, THERE ARE SUBSEQUENT FINDINGS THAT DEAL SPECIFICALLY WITH THE BUTTERFLY HABITAT.

Q. IN FACT, IF YOU WOULD TAKE A LOOK AT THE SECOND PAGE, DOES THAT FINDING DEAL SPECIFICALLY WITH THE BUTTERFLY HABITAT?

A. SORRY? WHICH ONE?

Q. SECOND PAGE, FINDING NUMBER 4?

A. YES, IT DOES.

Q. WOULD YOU READ FINDING NUMBER 4 TO THE JURY?

A. FINDING NUMBER 4 SAYS:

"THE DESIGN OF THE SUBDIVISION AS NOTED IN 2 AND 3 [p. 874] ABOVE IS LIKELY TO CAUSE SUBSTANTIAL ENVIRONMENTAL

DAMAGE AND SUBSTANTIALLY INJURE THE HABITAT OF THE ENDANGERED SMITH'S BLUE BUTTERFLY."

Q. SO FINDING NUMBER 4 DOES NOT EXPRESSLY CROSS-REFERENCE TO FINDING NUMBER 1 DEALING WITH THE SAND AND GRADING?

A. NO. IT REFERS TO FINDINGS NUMBER 2 AND 3.

Q. WHICH OF THESE FINDINGS, AND I DON'T WANT TO BELABOR THIS, RELATE TO THE IMPACTS OF THE PROPOSED DEVELOPMENT ON THE BUTTERFLY HABITAT?

MR. JACOBSEN: I OBJECT. ONCE AGAIN, THAT CALLS FOR SPECULATION. THERE IS NO FOUNDATION. THE DOCUMENT SPEAKS FOR ITSELF.

THE COURT: NO. I WILL OVERRULE THE OBJECTION. HE CAN TESTIFY AS TO THE DOCUMENT.

THE WITNESS: NUMBER 4 DEALS WITH THE HABITAT AS DOES NUMBER 2.

Q. (BY MR. YUHAS) LOOKING AT NUMBER 2, WAS IT KNOWN FROM THE BEGINNING OF THIS PROJECT THAT THE DEVELOPMENT WOULD HAVE SIGNIFICANT IMPACTS ON THE FLORA AND FAUNA?

A. WHAT DO YOU MEAN BY THE BEGINNING OF THIS PROJECT?

Q. AS FAR BACK AS WHEN THE ENVIRONMENTAL IMPACT REPORT WAS PREPARED.



A. SURE. THAT WAS FLAGGED AS AN ISSUE.

Q. WAS IT CONTEMPLATED THAT DESPITE HAVING THOSE TYPES OF IMPACTS THAT THE PROJECT COULD NONETHELESS PROCEED?

[p. 875] A. THAT'S TRUE. IT WAS FELT THAT THROUGH MITIGATION MEASURES THOSE PROBLEMS COULD BE RESOLVED.

Q. SPECIFICALLY WITH RESPECT TO THE HABITAT OF THE SMITH'S BLUE BUTTERFLY, WAS IT CONTEMPLATED THAT THOSE IMPACTS WOULD BE MITIGATED?

A. IT DEALT WITH THIS HABITAT RESTORATION PLAN THAT WOULD BE APPROVED BY THE CITY OF MONTEREY, BY THE STATE OF CALIFORNIA DEPARTMENT OF FISH AND GAME AND BY THE FEDERAL DEPARTMENT OF FISH AND WILDLIFE.

Q. WHAT DID THE CITY COUNCIL DETERMINE IN JUNE OF 1986 AS TO WHETHER THE RESTORATION PLAN ADEQUATELY MITIGATED THE ENVIRONMENTAL IMPACTS?

A. THEY FOUND IT DID NOT.

\* \* \*

[p. 1124] HAYWOOD

DIRECT NORTON / YUHAS

Q. FOCUSING SPECIFICALLY NOW ON HABITAT, IF I MAY, AND YOU HAVE BEFORE YOU I THINK EXHIBIT 26 AND EXHIBIT 28. IF YOU WOULD FOCUS ON EXHIBIT 28 FOR A MOMENT, CAN YOU TELL THE JURY WHAT EXHIBIT 28 IS AND I HAVE BLOWN UP

FOR THE JURY A PORTION OF IT, BUT CAN YOU EXPLAIN WHAT THIS ENTIRE DOCUMENT IS?

A. THIS WAS A LETTER TO MR. ED BROWN, THE EXECUTIVE DIRECTOR OF THE COASTAL COMMISSION, FROM MYSELF EXPLAINING THE POLICY MODIFICATIONS AND THE RESPONSE TO THE MODIFICATIONS THAT WERE SUGGESTED IN THE TWO COASTAL COMMISSION STAFF REPORTS.

Q. NOW, ATTACHED TO THAT LETTER ARE A COUPLE OF RESOLUTIONS SOMETHING CALLED AN ADDENDUM DATED FEBRUARY 22, 1984, CORRECT?

A. YES.

Q. WHAT IS THAT ADDENDUM? WHAT DOES THAT SHOW?

A. THIS SHOWS THE POINTS THAT WE COULD AGREE ON OUT OF THEIR STAFF REPORT AND IT WAS PRIMARILY THE LANGUAGE THAT WAS UNDERLINED AND THEN IT ALSO SHOWS THE LANGUAGE, THE [p. 1125] ORIGINAL LANGUAGE OF THE COASTAL COMMISSION STAFF.

Q. SO IN EFFECT THIS SHOWS WHAT THE CITY'S PROPOSAL WAS AND WHAT THE COASTAL COMMISSION'S RESPONSE WAS?

A. CORRECT.

Q. NOW, AS PART OF THE NEGOTIATIONS OVER THE HABITAT PROTECTION IN TERMS TO BE INCLUDED IN THE LAND USE PLAN, DID THE CITY HAVE A PROPOSAL AS TO THE CIRCUMSTANCES UNDER WHICH A DUNE RESTORATION PROGRAM SHOULD BE REQUIRED?

A. YES.

Q. AND WHAT DID THE CITY PROPOSE IN THAT REGARD?

A. THAT, I BELIEVE, IS ON PAGE 5. IT'S RELATED TO THE SMITH'S BLUE BUTTERFLY HABITAT THAT THE EXISTING SMITH'S BLUE BUTTERFLY HABITAT ON THE BACK DUNE RAISED AND HOW THEY ARE EXPOSED ON THE PHILLIPS PETROLEUM PROPERTIES AND HOME PROPERTIES.

Q. WHAT ABOUT THIS?

A. SHALL, SO AS TO AVOID THE MAXIMUM EXTENT VISIBLE, AVOID ANY DAMAGE OR ANY DIRECT CONSTRUCTION DAMAGE TO THE HABITAT FROM THE SITE OF THE OF NEW DEVELOPMENT. CONSTRUCTION DAMAGE DEVELOPMENT ACTIVITIES AND FROM DISRUPTION AFTER DEVELOPMENT IS IN PLACE.

Q. SO THE PROPOSAL THAT WAS MADE BY THE CITY WAS THAT IN CERTAIN AREAS THAT THE HABITAT SHALL BE PROTECTED TO THE MAXIMUM EXTENT FEASIBLE, CORRECT?

A. YES.

[p. 1126] Q. AND WHAT WAS THE COASTAL COMMISSION'S RESPONSE TO THAT?

A. THEY RESPONDED THAT ALL, THIS IS THE UNDERLINE, ALL ENVIRONMENTALLY SENSITIVE SHALL BE PROTECTED.

Q. SO THEY DELETED THE FEASIBILITY LIMITATION?

A. YES.

Q. NOW, ASIDE FROM AREAS WHERE THE SMITH'S BLUE BUTTERFLY WAS, AM I CORRECT THAT LOCAL COASTAL PLAN, THE LAND USE PLAN ALSO INCLUDED PROVISIONS DEALING JUST GENERALLY WITH RESTORATION PLANS?

A. YES.

Q. AND IF YOU LOOK AT THE BOTTOM OF PAGE 2, DOES THAT RELATE TO AND GOING ON TO THE NEXT PAGE THE CITY PROPOSAL REGARDING UNDER WHAT CIRCUMSTANCES THAT, JUST IN GENERAL TERMS THE DUNE RESTORATION PROGRAMS SHOULD BE REQUIRED AND THE COASTAL COMMISSION RESPONSE?

A. YES.

Q. AND WHAT DID THE CITY PROPOSE AS TO THE CIRCUMSTANCES UNDER WHICH A DUNE RESTORATION PROGRAM SHOULD BE REQUIRED?

A. WHERE IT DISTURBS THE DUNE VEGETATION.

Q. AND WHAT IS IT THAT THE COASTAL COMMISSION INSISTS BE INCLUDED INSTEAD OF THAT?

A. THEY INSERTED A FIGURE A WHICH IDENTIFIES DUNE HABITAT AREAS THAT ARE REPRESENTED ON THE MAP, SO THEY DREW A SQUARE ON THE MAP AND SAID THAT EVERYTHING WITHIN THIS AREA WAS TO BE SUBJECT TO THE HABITAT RESTORATION PROGRAM.

[p. 1127] Q. NOW, IN THE LAND USE PLAN PORTION THAT WAS PRESENTED TO THE COASTAL COMMISSION STAFF, DID IT INCLUDE ANY REQUIREMENT PRIOR TO THIS TIME THAT THE RESTORATION PLAN BE REVIEWED AND APPROVED BY ANY STATE OR FEDERAL AGENCIES?

A. I BELIEVE SO, YES.

Q. NOW, IF YOU LOOK AT PAGE 5, YOU SEE THE LANGUAGE WHERE IT SAYS THE BIOLOGICAL FIELD SURVEY MAPS?



A. YES.

Q. NOW, THAT LANGUAGE IS UNDERLINED HERE. WHAT DOES THAT INDICATE?

A. THAT THE PLANS WOULD BE SUBJECT TO THE REVIEW OF THE COASTAL COMMISSION, THE DEPARTMENT OF FISH AND GAME AND U.S. FISH AND WILDLIFE.

Q. WAS THIS LANGUAGE PROPOSED BY THE CITY OR BY THE COASTAL COMMISSION?

A. THIS LANGUAGE IS UNDERLINED. IT'S PROPOSED BY THE COASTAL COMMISSION.

Q. AND THE FACT THAT IT'S UNDERSCORED SUGGESTS THAT IT WAS ADDED TO THE LANGUAGE PROPOSED BY THE CITY?

A. YES.

Q. NOW, THIS DOCUMENT, THE THINGS THAT ARE INCLUDED IN THIS DOCUMENT, ARE THESE SUGGESTIONS OR RECOMMENDATIONS THAT THE CITY, IN FACT, INCORPORATED INTO THE LAND USE PLAN THAT IT LATER ADOPTED TO THE DEL MONTE BEACH AREA?

A. YES.

[p. 1417] JURY INSTRUCTIONS

NOW, GENERALLY SPEAKING WHAT IS THIS CASE ABOUT? THIS IS A FEDERAL CIVIL RIGHTS ACTION, AS YOU KNOW, BROUGHT BY THE PLAINTIFF, DEL MONTE DUNES AGAINST THE CITY OF MONTEREY.

NOW, THE DEL MONTE DUNES PARTNERSHIP OWNED THE REAL ESTATE THAT IS THE SUBJECT OF THIS ACTION, AND AS A RESULT OF THE DENIAL OF THE CITY, AS A RESULT OF THE CITY OF MONTEREY

DENIAL'S [sic] OF THE SUBDIVISION APPLICATION, DEL MONTE DUNES CLAIMS THAT THE CITY HAS DEPRIVED IT OF TWO CONSTITUTIONAL RIGHTS, FIRST THE RIGHT TO JUST COMPENSATION, THE TAKING OF ITS PROPERTY, WHAT WE CALL A TAKING CLAIM. AND WE ALSO USE A FANCY TERM CALLED INVERSE CONDEMNATION, THAT IS WHERE THE ACTIONS OF THE CITY HAVE, IF YOU FIND IT TO BE TRUE, TAKEN THE PROPERTY AND THE LAND OWNER IS ENTITLED TO BE RECOMPENSED.

THE SECOND CLAIM IS THE CLAIM FOR EQUAL PROTECTION, THE VIOLATION OF EQUAL PROTECTION UNDER LAW. NOW, THE CITY CAN BE LIABLE FOR THE KINDS OF ALLEGATIONS AND CHARGES BROUGHT BY THE PLAINTIFF HERE. OF COURSE, IT IS UP TO YOU TO DECIDE WHETHER THE CITY IS OR IS NOT. SO YOU HAVE TO DECIDE WHETHER THE PLAINTIFF, DEL MONTE DUNES, CONSTITUTIONAL [p. 1418] RIGHTS WERE VIOLATED AND IF SO WHETHER DEL MONTE DUNES HAS SUFFERED ANY DAMAGES AS A RESULT.

NOW, ON EACH OF THESE TWO CLAIMS, THE TAKING CLAIM AND THE EQUAL PROTECTION CLAIM, THE PLAINTIFF HAS THE BURDEN OF PROVING THE FOLLOWING ELEMENTS BY A PREPONDERANCE OF THE EVIDENCE.

NUMBER ONE, THAT THE ACTS OR OMISSIONS OF THE CITY WERE INTENTIONAL;

NUMBER TWO, THAT THE CITY ACTED UNDER COLOR OF LAW.

NOW, THAT SECOND ELEMENT HAS BEEN AGREED SO YOU REALLY DON'T NEED TO MAKE A DECISION ON THAT. IT IS JUST AN ELEMENT THERE THAT IS REQUIRED BY LAW THAT THERE HAS BEEN

A DISPUTE ABOUT, THAT THE CITY'S ACTIONS WERE UNDER THE COLOR OF LAW.

AND NUMBER THREE, THAT THE ACTS OR OMISSIONS OF THE CITY WERE THE PROXIMATE CAUSE OF THE DEPRIVATIONS OF PLAINTIFF'S RIGHTS PROTECTED BY THE CONSTITUTION.

THAT IS THE RIGHT NOT TO HAVE YOUR PROPERTY TAKEN WITHOUT COMPENSATION AND THE RIGHT TO EQUAL PROTECTION. SO THOSE ARE THE TWO CLAIMS AND IF YOU FIND THAT EACH OF THESE ELEMENTS AS THE CLAIM HAS BEEN PROVED, THEN YOUR VERDICT SHOULD BE FOR THE PLAINTIFF.

ON THE OTHER HAND, IF THESE ELEMENTS HAVE NOT BEEN PROVED YOUR VERDICT ON THAT CLAIM SHOULD BE FOR THE DEFENDANT.

[p. 1419] NOW, I WILL TURN NOW TO THE TAKING CLAIM. THE FIRST QUESTION THAT WILL BE ASKED IS, THE ACTIONS OF THE CITY OF MONTEREY, CULMINATING IN THE RESOLUTION OF JUNE 17, 1986, DID OR DID NOT RESULT IN THE TAKING OF PLAINTIFF'S PROPERTY. ONE OF THE CONSTITUTIONAL RIGHTS WHICH THE PLAINTIFF CLAIMS WAS VIOLATED BY THE CITY IS THE RIGHT TO JUST COMPENSATION FOR THE TAKING OF PROPERTY BY A GOVERNMENT.

AND THE FIRST AMENDMENT TO THE CONSTITUTION PROVIDES THAT NO - I AM GOING TO PARAPHRASE, PRIVATE PROPERTY SHALL NOT BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION.

NOW, PLAINTIFF ASSERTS AND CLAIMS THAT THE DEFENDANT, THROUGH ITS ACTION, HAS TAKEN ITS PROPERTY. IN ORDER TO ESTABLISH

THAT THE CITY HAS TAKEN THE PLAINTIFF'S PROPERTY BY DENYING PLAINTIFF'S DEVELOPMENT APPLICATION, THE PLAINTIFF HAS THE BURDEN OF PROVING,

NUMBER ONE, THAT IT HAS BEEN DENIED ALL ECONOMICALLY VIABLE USE OF THE PROPERTY.

OR TWO, THAT THE CITY'S DECISION TO REJECT THE PLAINTIFF'S 190 UNIT DEVELOPMENT PROPOSAL DID NOT SUBSTANTIALLY ADVANCE A LEGITIMATE PUBLIC PURPOSE.

NOW, IF YOU FIND THAT EITHER OF THESE THINGS HAS BEEN PROVED, YOUR VERDICT INDEED IS FOR THE PLAINTIFF ON THIS TAKING CLAIM.

ON THE OTHER HAND, IF THESE THINGS HAVE NOT BEEN PROVED, THEN YOUR VERDICT SHALL BE FOR THE DEFENDANT ON THIS [p. 1420] TAKING CLAIM.

AND THE FOLLOWING ARE SOME ADDITIONAL ELEMENTS IN CONNECTION WITH YOUR FINDING WHETHER THERE HAS OR HAS NOT BEEN A TAKING. FOR THE PURPOSE OF A TAKING CLAIM, YOU WILL FIND THAT THE PLAINTIFF HAS BEEN DENIED ALL ECONOMICALLY VIABLE USE OF ITS PROPERTY, IF, AS THE RESULT OF THE CITY'S REGULATORY DECISION THERE REMAINS NO PERMISSIBLE OR BENEFICIAL USE FOR THAT PROPERTY. IN PROVING WHETHER THE PLAINTIFF HAS BEEN DENIED ALL ECONOMICALLY VIABLE USE OF ITS PROPERTY, IT IS NOT ENOUGH THAT THE PLAINTIFF SHOW THAT AFTER THE CHALLENGED ACTION BY THE CITY THE PROPERTY DIMINISHED IN VALUE OR THAT IT WOULD SUFFER A SERIOUS ECONOMIC LOSS AS THE RESULT OF THE CITY'S ACTIONS.

THE REGULATION OR ACTION BY THE CITY DOES NOT CONSTITUTE A TAKING SIMPLY BECAUSE



IT PREVENTS THE HIGHEST AND BEST USE OF THE PROPERTY. IN ORDER TO FIND THAT THE PLAINTIFF HAS BEEN DENIED ALL ECONOMICALLY VIABLE USE OF THE PROPERTY, THERE MUST BE A SHOWING THAT AFTER THE ACTION OF THE CITY THAT IS BEING CHALLENGED HERE, THE PROPERTY IS LEFT WITH NO REMAINING SIGNIFICANT VALUE.

PUBLIC BODIES, SUCH AS THE CITY, HAVE THE AUTHORITY TO TAKE ACTIONS WHICH SUBSTANTIALLY ADVANCE LEGITIMATE PUBLIC INTEREST AND LEGITIMATE PUBLIC INTEREST CAN INCLUDE PROTECTING THE ENVIRONMENT, PRESERVING OPEN SPACE AGRICULTURE, PROTECTING THE HEALTH AND SAFETY OF ITS [p. 1421] CITIZENS, AND REGULATING THE QUALITY OF THE COMMUNITY BY LOOKING AT DEVELOPMENT. SO ONE OF YOUR JOBS AS JURORS IS TO DECIDE IF THE CITY'S DECISION HERE SUBSTANTIALLY ADVANCED ANY SUCH LEGITIMATE PUBLIC PURPOSE.

THE REGULATORY ACTIONS OF THE CITY OR ANY AGENCY SUBSTANTIALLY ADVANCES A LEGITIMATE PUBLIC PURPOSE IF THE ACTION BEARS A REASONABLE RELATIONSHIP TO THAT OBJECTIVE.

NOW, IF THE PREPONDERANCE OF THE EVIDENCE ESTABLISHES THAT THERE WAS NO REASONABLE RELATIONSHIP BETWEEN THE CITY'S DENIAL OF THE CLAIMS PROPOSAL AND LEGITIMATE PUBLIC PURPOSE, YOU SHOULD FIND IN FAVOR OF THE PLAINTIFF. IF YOU FIND THAT THERE EXISTED A REASONABLE RELATIONSHIP BETWEEN THE CITY'S DECISION AND A LEGITIMATE PUBLIC PURPOSE, YOU SHOULD FIND IN FAVOR OF THE CITY. AS LONG AS THE REGULATORY ACTION BY THE CITY SUBSTANTIALLY ADVANCES THEIR LEGITIMATE PUBLIC PURPOSE, AND ITS UNDERLYING MOTIVES AND REASONS ARE NOT TO BE INQUIRED INTO.

NOW, IN ANALYZING WHETHER PLAINTIFF'S RIGHT TO COMPENSATION HAS BEEN VIOLATED, THAT IS THE PROPERTY WAS TAKEN, YOU ARE ENTITLED TO CONSIDER THE STAMP TO WHICH THE CITY, IN ITS REGULATION, INTERFERED WITH THE PLAINTIFF'S REASONABLE DISTINCT INVESTMENT BACK EXPECTATIONS. SO THOSE ARE YOUR INSTRUCTIONS OF THE LAW WITH RESPECT TO THE TAKING OF THIS CLAIM.

\* \* \*

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No. 97-1235

In The  
**Supreme Court of the United States**  
October Term, 1997

CITY OF MONTEREY,

*Petitioner,*

v.

DEL MONTE DUNES AT MONTEREY, LTD. AND  
MONTEREY-DEL MONTE DUNES CORPORATION,

*Respondents.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

**BRIEF FOR THE PETITIONER**

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**QUESTIONS PRESENTED**

1. Whether, in a regulatory takings action challenging a local land use decision, 42 U.S.C. § 1983 requires that all inverse condemnation liability issues be determined by the court rather than by a jury.
2. Whether liability for a regulatory taking can be based upon a standard that allows a jury or court to reweigh evidence concerning the reasonableness of the public entity's land use decision.
3. Whether the rough proportionality standard established by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in the context of property exactions was properly applied by the Ninth Circuit to an inverse condemnation claim based upon a regulatory denial.

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## OPINION BELOW

The opinion of the court of appeals is reported at 95 F.3d 1422 (9th Cir. 1996). The relevant, prior orders of the district court are unreported but are included in the appendix to the Petition For A Writ of Certiorari at Pet. App. 30-43.

## JURISDICTION

The court of appeals filed its initial opinion on September 13, 1996 (95 F.3d 1422). The court of appeals initially granted rehearing on June 26, 1997 (Pet. App. 44) and subsequently decided on October 28, 1997 not to amend its opinion. (Pet. App. 46). The Petition For A Writ of Certiorari was filed on January 26, 1998 and was granted on March 30, 1998. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS,  
STATUTES AND REGULATIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution, Section 1, which provides in pertinent part:  
No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
2. The Fifth Amendment to the United States Constitution, which provides in pertinent part:  
No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. The Seventh Amendment to the United States Constitution, which provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact trial by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

4. 42 U.S.C. § 1983, which provides in pertinent part:  
Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

### STATEMENT

This case involves a 37-acre parcel of undeveloped property located in the coastal area of the City of Monterey ("City") in California. Faced with conflicting information concerning environmental impacts and other issues, the City denied Del Monte Dunes' request to build a 190-unit condominium development in an environmentally sensitive beachfront area. Federal and state regulatory agencies, City staff and others participating in the public hearing process advised the City Council that the developer had not yet formulated a plan that would adequately mitigate likely impacts of the proposed development. While Del Monte Dunes presented contrary information, the City Council concluded that Del Monte Dunes had not yet sufficiently addressed environmental

problems and other concerns. Consequently, the City refused to approve the proposed project.

After considering essentially the same evidence that was evaluated by the City Council, the trial court ruled that the City's decision did not violate any substantive due process right of Del Monte Dunes. The trial court concluded that "the City Council was not acting arbitrarily and irrationally in passing a resolution in June of 1986 [denying the proposed development], it was acting for valid regulatory reasons and not attempting to forestall all reasonable development." Pet. App. 43.

The jury was allowed to decide Del Monte Dunes' claims for inverse condemnation and denial of equal protection. With respect to the inverse condemnation claim, the jury was allowed to determine whether the City's action substantially advanced a legitimate purpose; that is, whether denial of a 190-unit condominium development in an environmentally sensitive area bore a reasonable relation to the City's legitimate goal of protecting the environment. The jury was also allowed to determine whether the City's decision had deprived Del Monte Dunes of all economically viable use of the subject property even though Del Monte Dunes had sold the property for \$4.5 million (\$800,000 more than its purchase price) while the case was pending.

Without indicating which of these theories of inverse condemnation liability it had accepted, the jury concluded that a regulatory taking had occurred and awarded damages of \$1.45 million.<sup>1</sup> The Ninth Circuit

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<sup>1</sup> The jury also found in favor of Del Monte Dunes on its equal protection claim. Because the Ninth Circuit affirmed the judgment on the basis of the jury's inverse condemnation



affirmed the jury's decision, concluding that these issues were properly triable to the jury and that there was some evidence to support a jury determination that the City's decision was either unreasonable or at least not roughly proportional to the City's legitimate concerns.

### 1. The Subject Property.

This action arises out of efforts by Del Monte Dunes and its predecessors to build a 190-unit condominium development on a 37-acre parcel of undeveloped coastal property within the area known as Del Monte Beach. This property lies within the City's jurisdiction and, in the first instance, is subject to the City's planning policies and regulations. The City's general plan designates the property for multi-use residential development, which includes condominium development. Tr. Exh. 6 at pp. 30 & 34.<sup>2</sup>

The subject property and the rest of the Del Monte Beach area also lies within the jurisdiction of the California Coastal Commission ("Coastal Commission"). R. 231-32. The Coastal Commission has final regulatory control over developments in coastal areas, and any proposed coastal development approved by the City must

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verdict, it did not reach the merits of the equal protection claim or the City's appeal therefrom, and that claim is not before this Court. If the Ninth Circuit's decision is reversed as to the inverse condemnation claim, this case must be remanded to the Ninth Circuit for a decision on the equal protection cause of action.

<sup>2</sup> All trial exhibits referenced herein were introduced at trial as joint exhibits. Prior to the commencement of trial, the parties stipulated to the admissibility of trial exhibits numbers 1-120, 122-134, and 136-165. R. 7-9.

also comply with Coastal Commission requirements. R. 232. Included was a requirement that any development in the Del Monte Beach area would require a detailed restoration plan describing how the developer would mitigate impacts on the existing habitat. Jt. App. 202-05; Tr. Exh. 28.

Substantial portions of the subject property consisted of sand dunes that are among the largest and best preserved in any of the Central California dune systems. Tr. Exh. 48 at p. 15. These dunes provide natural habitat for various types of native plants and animals. Most significantly, the dunes are home to a type of native buckwheat which is the natural habitat of the endangered Smith's Blue Butterfly ("SBB"). Jt. App. 136-37. Due to the presence of this buckwheat, the SBB and other habitat, the City, the U.S. Fish and Wildlife Service ("USFWS"), the California Department of Fish and Game ("Cal DFG") and the Coastal Commission all considered the subject property to be environmentally sensitive and important. Jt. App. 11-18, 42-44, 84-88 and 200-01.

### 2. The 1984 Conditional Site Plan Approval.

Prior to late 1984, the subject property was owned by Ponderosa Homes ("Ponderosa"). During the early 1980s, Ponderosa pursued efforts to develop the subject property, beginning with a proposed 344-unit development that included a clubhouse, swimming pool, and tennis courts. R. 259-60. Gradually, Ponderosa scaled back its proposal. By mid-1984, Ponderosa had redesigned its proposal to consist of a 190-unit condominium development.

In September of 1984, Ponderosa sought approval of a site plan for this proposed 190-unit development. Jt.

App. 57. The site plan identified the number of units, the proposed layout of those units and designated access routes. Because the proposed development would affect sensitive dune habitat, Ponderosa prepared a preliminary habitat restoration plan that described measures to mitigate the environmental damage likely to result from the proposed development. Jt. App. 21-31. Ponderosa circulated this preliminary restoration plan to the City, Cal DFG, USFWS and others.

The City actively sought input from USFWS in light of its recognized expertise in such matters. R. 271-72. When the time came for the City Council to make a decision on the proposed site plan in September of 1984, however, USFWS responded that they needed more information to evaluate the adequacy of the preliminary restoration plan. Jt. App. 50-51; Tr. Exh. 84 at p. 16. Due to the lack of definitive input regarding the preliminary restoration plan, the City Council deferred final approval of the proposed 190-unit development. Jt. App. 59. Instead, the City Council granted a conditional use permit ("CUP"), which conditionally approved the site plan, and thereby expressed general acceptance of the location, density and accessways for the project. Jt. App. 60-65. In so doing, however, the City Council and staff made clear that the 190-unit development would be given final approval only if the developer could adequately mitigate the harm to the habitat likely to be caused by the proposed development. Tr. Exh. 84 at p. 16; R. 828-29. The CUP required that the final habitat protection measures satisfy the criteria in the local coastal plan and that those measures be reviewed and approved by the City, the USFWS and Cal DFG. Jt. App. 62. The CUP expressly provided that, if it appeared that the final restoration

plan would not adequately mitigate the environmental impacts of the proposed 190-unit development, the developer would be required to modify and resubmit its site plan. Jt. App. 62.

### **3. The City's 1986 Denial of the Proposed Development.**

In late 1984, Del Monte Dunes purchased the subject property from Ponderosa for approximately \$3.7 million. R. 511. Thereafter, it pursued efforts to obtain final approval for the proposed 190-unit development. Among other things, Del Monte Dunes prepared a final restoration plan and circulated that plan to the City, USFWS, Cal DFG and others. Jt. App. 108-34; R. 281 & 838-39.

The "final" restoration plan was completed in February 1986. Jt. App. 108-34. In general, the final plan designated certain portions of the subject property as preservation areas that would not be impacted by the development. Jt. App. 119-21. Public access to these designated areas was to be restricted to protect the habitat located therein. Jt. App. 120. Portions of the subject property that would be altered by construction activities were deemed "restoration" areas. Jt. App. 121. The final plan contemplated that native plants would be removed from these areas prior to the construction and efforts would be made to revegetate the impacted areas after construction was completed. Jt. App. 121-23. After these efforts to revegetate the affected areas, the developer or its designee would be responsible for a maintenance program for several years. Jt. App. 128. Thereafter, Del Monte Dunes' final restoration plan contemplated that maintenance responsibility for the restoration areas would be turned over to an appropriate public agency,



such as the California Department of Parks and Recreation. Jt. App. 128-29.

The City Council held public hearings on the proposed development in May and June of 1986. During the months preceding those hearings, the City's staff actively sought and obtained input concerning the final restoration plan from a wide variety of sources. Jt. App. 78, 145-46, 150 and 287-88. Most of that input indicated that the final plan was deficient in important respects. The view expressed by the USFWS in a letter presented to the City Council at the public hearings was that "the project will destroy most, if not all, of the Smith's blue butterflies (SBB) and their host plants on the site, and the final restoration plan will not likely succeed in replacing lost habitat or preserving SBB at that location." Jt. App. 150. The USFWS letter also referenced its own prior biological opinion, generated the preceding year, which had concluded that, although the proposed development was not likely to jeopardize the continued existence of the SBB species as a whole, it would destroy important buckwheat habitat. Jt. App. 78. USFWS also asserted in its biological opinion that the restoration plan had "little chance for long term success . . . ." Jt. App. 78.

The Cal DFG was also critical of the final restoration plan. The Cal DFG representative at the public hearings asserted that it continued to have problems with the project and that the final restoration plan had not been approved by the Cal DFG. Jt. App. 287-88. Dr. Richard Arnold, an outside expert on habitat protection issues, echoed these concerns over the proposed habitat mitigation measures, as did others. R. 860-64.

Del Monte Dunes disagreed with the concerns expressed over the final restoration plan. Its consultant, Dr. Richard Bright, attended the public hearings and opined that the final restoration plan was adequate and, in fact, would ultimately improve the condition of the site. Tr. Exh. 150 at pp. 20-34.

After considering all of this information, the City Council denied Del Monte Dunes' application for final approval of the proposed 190-unit development. Tr. Exh. 151. Among other things, the City Council cited the inadequacy of the final restoration plan and the unwillingness of state and federal agencies to express their approval of that plan.<sup>3</sup> Tr. Exh. 150 at pp. 47-55; Tr. Exh. 151.

The City Council's denial of the proposed 190-unit development did not modify the existing general plan or zoning ordinances, which continued to permit residential development on the subject property. Tr. Exh. 151. Nor did the City Council express any views about the likelihood that a revised plan or development would be approved. Nevertheless, Del Monte Dunes made no subsequent attempt to modify its development proposal in order to meet the problems identified by the City Council. R. 288. Because it felt that any redesign would reduce

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<sup>3</sup> Another problem considered by members of the City Council in denying the proposed development was that Del Monte Dunes had not yet acquired the property needed to provide the secondary access that was required for the project. Some members of the City Council raised a concern that Del Monte Dunes apparently expected the City to exercise its power of eminent domain to acquire the necessary property for this secondary accessway. Jt. App. 289-90. These council members further expressed a reluctance to use the City's condemnation power to benefit a private party. Jt. App. 289-90; Tr. Exh. 150 at pp. 47-51.

density or increase costs so as to make the project unprofitable, Del Monte Dunes was not interested in pursuing any such alternatives. R. 288-89. Instead, Del Monte Dunes filed suit against the City, asserting that the City's decision to deny its application had denied Del Monte Dunes its right to substantive due process and equal protection, and had resulted in the taking of the subject property.

During the pendency of the action, Del Monte Dunes sold the subject property in 1991 to the State of California for \$4.5 million. R. 518-19. In arriving at the \$4.5 million dollar purchase price, the State relied upon an appraisal that assumed that the highest and best use of the property was for residential development with a density of up to 150 units. R. 532-33 & 535-37.

#### **4. The Allocation of Decision-Making Responsibility at Trial.**

Prior to the commencement of trial, the City requested that the liability issues raised by each of Del Monte Dunes' claims be decided by the court rather than the jury. Jt. App. 1, USDC Docket Entry No. 105. The district court granted this request insofar as it was directed at the substantive due process claim and concluded that it would decide whether the City's actions were arbitrary and capricious. Pet. App. 33. However, the district court ruled that all aspects of Del Monte Dunes' equal protection and inverse condemnation claims would be decided by the jury. Pet. App. 33-34.

The evidence at trial consisted largely of the same conflicting evidence that the City Council had considered in mid-1986 when it denied the proposed development. Del Monte Dunes presented the same consultant that it

had presented to the City Council, and he expressed the same opinion that the final habitat restoration plan was adequate. R. 332-76. The City introduced contrary opinions from Dr. Richard Arnold, who had also previously expressed his opinions to the City Council. R. 1054-86. The City also introduced as evidence the same USFWS and Cal DFG evaluations considered by the City Council in 1986, which described likely environmental impacts and inadequacies in the final restoration plan. *See, e.g.,* Jt. App. 149, 150-52 and 287-88.

After hearing all of the evidence, the trial court concluded that the City had not acted arbitrarily and capriciously so as to violate Del Monte Dunes' right to substantive due process. The court noted that "exhaustive time and energy was spent by the staff of the City and by its planning commission in working on this development" and that "it was all a sincere effort by those people." Pet. App. 41. The court went on to conclude that, in rejecting the proposed development, the City "was not acting arbitrary and irrationally . . . it was acting for valid regulatory reasons and not attempting to forestall all reasonable development." Pet. App. 43. In arriving at this conclusion, the district court specifically noted that the proposed project raised significant environmental issues that both USFWS and Cal DFG had concluded were not adequately mitigated. Pet. App. 42.

In contrast, with respect to the claims for denial of equal protection and for inverse condemnation, the jury concluded that the City's denial of the proposed 190-unit condominium development had violated Del Monte Dunes' constitutional rights. Jt. App. 1, USDC Docket Entry No. 141. Although Del Monte Dunes had sold the subject property during the pendency of the action for



\$4.5 million, the jury awarded \$1.45 million in temporary takings damages.

#### 5. The Ninth Circuit's Reasonableness and Rough Proportionality Standard of Liability.

The Ninth Circuit ruled that all issues relating to the inverse condemnation claim were properly submitted to the jury for decision. Pet. App. 7-15. The court reasoned that such inverse condemnation claims were analogous to common law damage actions, such as actions for trespass, which historically had been triable by jury. Pet. App. 9. The Ninth Circuit further concluded that the underlying issues of inverse condemnation liability were questions of fact for the jury, rather than mixed questions of fact and law of a type that were properly decided by the court. Pet. App. 15.

As to the standard that should be applied to determine whether the jury's inverse condemnation verdict could be upheld, the Ninth Circuit applied a reasonableness test. The court determined that the jury's decision was sustainable as long as there was evidence in the trial record that would support a finding that the City had acted unreasonably in concluding that the proposed project failed to provide adequate protection for sensitive environmental habitat or otherwise failed to satisfy the conditions imposed by the City's prior conditional approval of the site plan. Pet. App. 14, 16-20.

In arriving at this reasonableness standard, the Ninth Circuit did not simply determine whether the jury could have properly found that the City's action in denying the proposed 190-unit project failed to substantially advance the legitimate public goal of protecting the environment.

Instead, the court applied the standard of rough proportionality based on *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which was decided several months after the trial in the present action. In framing the issue, the Ninth Circuit reasoned that "[e]ven if the City had a legitimate interest in denying Del Monte's development application, its action must be 'roughly proportional' to furthering that interest." Pet. App. 16. The Ninth Circuit concluded that "[s]ignificant evidence supports Del Monte's claim that the City's actions were disproportional to both the nature and extent of the impact of the proposed development." Pet. App. 20.

#### SUMMARY OF ARGUMENT

1. The availability of a right to jury trial in inverse condemnation claims brought under 42 U.S.C. § 1983 depends on whether such claims, and the issues encompassed therein, were triable by jury at common law when the Seventh Amendment was adopted. At common law, governments have long exercised the power to take private property for public use by exercising their power of eminent domain and initiating condemnation proceedings. When a public entity initiates such an action, the courts have consistently recognized that the property owner has no right to a jury in condemnation proceedings because the historical practice both in England and in the Colonies did not include a trial by jury for governmental takings.

Inverse condemnation actions are also based on claims that a government entity has taken private property and must pay just compensation. Like a direct condemnation proceeding, a claim for inverse condemnation

arises from the Fifth Amendment and seeks just compensation for the "taken" property. That an inverse condemnation action is initiated by the property owner, rather than by the government, does not change its essential nature. Inverse condemnation actions are equivalent to direct condemnation proceedings and therefore are not triable by jury under the Seventh Amendment or Section 1983.

Separate and apart from the historical absence of a right to jury trial in condemnation proceedings at common law, there is a second reason why juries should not decide liability issues in inverse condemnation actions based upon an alleged regulatory taking. By their nature, those liability issues are not based primarily on the resolution of disputed facts. Rather, those issues involve legalistic determinations that require consideration of the appropriate balance among competing concerns and due deference to local land use decision-makers. One theory of regulatory taking liability – whether a regulation substantially advances a valid public purpose – is directly analogous to substantive due process challenges, which have consistently been decided by courts as a matter of law or as a mixed question of fact and law. The other theory – whether the regulation deprives the property of all economically viable use – also involves interwoven factual and legal determinations that are more properly decided by courts.

2. No less important than who should decide inverse condemnation liability issues is the appropriate standard to be applied in reviewing decisions of local public entities. Recognizing that federal courts are not to become federal land use planners, courts have consistently refused to second-guess the wisdom or factual

correctness of local land use decisions. Instead, they have accorded deference to determinations made by local legislative and administrative bodies. For this reason, when a property owner asserts a takings claim on the theory that a land use regulation or permit denial fails to substantially advance a legitimate purpose, courts have rejected such claims as long as there is some logical relationship between the regulation and the goal identified by the public entity.

The Ninth Circuit's decision eliminates this deference and fundamentally changes the standard for inverse condemnation liability. By treating inverse condemnation liability issues as purely factual matters and allowing a jury to impose liability based upon its *de novo* determination of the reasonableness of the City's land use decision, the Ninth Circuit has established a new standard that allows *de novo* consideration of such decisions. This new standard creates a constitutional violation whenever a second decision-maker (judge or jury) concludes that it would have reached a different conclusion than the public agency.

3. The Ninth Circuit's affirmance of the jury's inverse condemnation decision must also be set aside because that affirmance was based upon the use of a "rough proportionality" standard of liability that does not apply in a regulatory takings context and that was never presented to the jury in this case. The "rough proportionality" standard of inverse condemnation liability was established in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to impose limitations on a public entity's ability to require the conveyance of property as a condition of development approvals. Neither the holding nor the rationale of *Dolan* applies to a regulatory denial.



Unlike the situation in *Dolan*, a regulatory denial does not involve a compelled conveyance of a property interest to the public. Additionally, the rough proportionality standard cannot be applied in any meaningful way in a regulatory denial context. In a situation involving a required dedication of property, the burden of a proposed development can be compared to the property interest being dedicated to determine the "rough proportionality" of the dedication requirement. However, a regulatory denial does not allow such a comparison. There is no second side of the "rough proportionality" equation that can be compared to the impacts or concerns which prompted denial of the project.

### ARGUMENT

During recent decades, this Court has worked to strike an appropriate balance in defining the role of the Constitution and federal courts in local land use decision-making. This Court has recognized that, in the first instance, such decisions are primarily matters of state law. When disputes arise over such decisions, such disputes must first be considered in the state courts. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). This approach is consistent with the historically limited role of the federal courts and federal law in the local land use context.

On a substantive level, federal courts have accorded substantial deference to local decision-makers in land use decision-making that involves only regulatory impacts. Recognizing that local officials must have discretion to regulate and balance competing interests and policies, courts step in only in extreme cases involving regulations that do not substantially advance public interest or that

have confiscatory impact. See *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). At the same time, the Supreme Court has imposed a higher standard of scrutiny when local entities attempt to extract for the public the actual right to use property interests held by private parties. See *Dolan*, 512 U.S. at 391 (requirements that property owner dedicate interest to the public are valid only if the dedication requirement is roughly proportional to the burdens of the proposed development).

The Ninth Circuit's decision seriously upsets the balance between the legitimate role of the Constitution in protecting property rights and the discretion needed by local governments to regulate land use. Rather than having local planning decisions evaluated by courts experienced in applying deferential legal standards and sensitive to federalism concerns, the Ninth Circuit would have juries consider *de novo* the evidence considered in the land use process and impose liability on local decision-makers if the jury disagrees with the reasonableness of the land use decision. What's more, the Ninth Circuit's decision would impose liability on local public entities for regulatory denials of proposed development projects based on a supposed failure to meet a roughly proportional standard that has no meaningful application in the regulatory takings context. The City requests that the Court restore the balance that the Ninth Circuit has disturbed.

### I. THERE IS NO RIGHT TO JURY DETERMINATION OF INVERSE CONDEMNATION LIABILITY ISSUES.

Courts, and not juries, have been responsible for adjudicating claims that a private party is entitled to just

compensation for a taking of property under the Fifth Amendment. Courts have done so because, as a matter of historical practice, condemnation claims were not triable by jury at common law. Courts have also done so because, especially in the context of regulatory takings, the nature of the liability standards make resolution of those issues the appropriate domain of the courts.

In the face of this longstanding practice, Del Monte Dunes sought and obtained the right to have the jury determine whether inverse condemnation occurred and impose liability on the City. The jury was asked to apply the amorphous standards of inverse condemnation liability that have frequently bedeviled courts over the years. Whereas, as a matter of law, this Court has consistently upheld local land use decisions and regulations in the face of claims that they did not substantially advance legitimate public goals, the jury in this case was allowed to decide, as a factual matter, that denial of a proposed 190-unit condominium in an environmentally sensitive area did not reasonably relate to the City's environmental protection goals or other concerns. Whereas this Court has rejected taking challenges, as a matter of law, even when the regulatory action dramatically reduced the value of property, the jury in this case was allowed to decide, as a factual matter, that the subject property had no economically viable use even while the City's planning guidelines permitted residential development and the property was sold to the State of California for \$4.5 million in its "taken" condition. It was error for the Ninth

Circuit to affirm the jury's resolution of either of these inverse condemnation liability issues.<sup>4</sup>

**A. Section 1983 Does Not Alter the Longstanding Practice That Claims Based Upon the Fifth Amendment Are Not Actions Triable by Jury at Common Law.**

**1. Section 1983 Neither Broadens Nor Narrows the Seventh Amendment Right to Jury Trial Applicable to the Underlying Federal Claim That Gives Rise to a Section 1983 Claim.**

In determining the scope of the right to jury trial in actions brought under 42 U.S.C. § 1983, the threshold inquiry is whether the language or legislative history of Section 1983 evidences an intent to confer a statutory right to jury trial independent of Seventh Amendment requirements. *Tull v. United States*, 481 U.S. 417, 417 n.3 (1987); *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974). When such an intent can be discerned, the right to a jury can be decided without regard to the Seventh Amendment. *Lorillard v. Pons*, 434 U.S. 575, 577 (1978).

It is well settled that 42 U.S.C. § 1983 is not a source of substantive rights but merely provides a vehicle for

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<sup>4</sup> The jury was asked to determine inverse condemnation liability under two theories: a) whether the City's denial of the project substantially advanced a legitimate public purpose; and b) whether the City's decision deprived the property of all economically viable use. Because the jury's verdict did not indicate which of these theories formed the basis of its liability finding, the Ninth Circuit recognized that the jury's inverse condemnation verdict could be upheld on appeal only if each of these theories was properly submitted to the jury and legally supportable. Pet. App. 10.



vindicating rights that are conferred by other federal laws. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). Consistent with its non-substantive nature, Section 1983 makes no independent or express provision for jury determination of claims or issues arising thereunder. Instead, Section 1983 provides generally that an aggrieved party deprived of any constitutional, common law or statutory right existing under federal law may seek redress "in an action at law, suit in equity or other proper proceeding . . . ."

The derivative nature of Section 1983 strongly suggests that Congress did not intend that Section 1983 would create an independent, statutory right to jury trial for claims arising thereunder. Unlike statutory measures that address a single discrete subject and provide specific remedies pertinent to that subject, Section 1983 can be used to vindicate a wide range of underlying rights. By providing that redress under Section 1983 could be obtained in "an action at law, suit in equity or other proper proceeding," Congress did not attempt to foreclose jury entitlement in appropriate cases "at law," but it also recognized that, depending upon the nature of the underlying right, redress could be obtained in a non-jury action for equitable relief or in some other form of proceeding.

The limited legislative history of Section 1983 is consistent with the absence of any Congressional intent to confer an independent, statutory right to jury, separate and apart from the underlying substantive rights being pursued. As the Court noted in *Monell v. Department of Social Services*, 436 U.S. 658, 665 (1978), in discussing the legislative history of the Civil Rights Act of 1871, "Section 1, now codified as 42 U.S.C. § 1983, was the subject of

only limited debate and was passed without amendment." To the extent that any intent was expressed in the debates leading to the adoption of § 1983, that intent was simply to provide remedies as broad as the protections afforded by the Constitution. *Id.* at 685 ("[Section 1 is] so simple and really [reenacts] the Constitution.") (quoting Senator Edmonds).

Under these circumstances, it is not possible to discern any congressional intent to grant a right to jury trial above and beyond the right to jury trial that exists under the Seventh Amendment. For this reason, the Ninth Circuit's statement that Section 1983 creates a statutory right to jury trial is wrong. While there clearly exists a right to jury for some types of actions and issues brought under Section 1983, the source of that right is the Seventh Amendment, not Section 1983 itself. *Cf. Curtis v. Loether*, 415 U.S. 189, 194 (1974) (right to jury trial in damage action under Title VII of the Civil Rights Act of 1968 arose under the Seventh Amendment); *see also Dolence v. Flynn*, 628 F.2d 1280, 1282 (10th Cir. 1980); *Burt v. Abel*, 585 F.2d 613, 616 n.7 (4th Cir. 1978); *Amburgey v. Cassady*, 507 F.2d 728, 730 (6th Cir. 1974).

## **2. Inverse Condemnation Claims Are Analogous to Eminent Domain Proceedings, Which Were Not Triable by Jury at Common Law.**

In determining whether a particular claim or issue carries with it a right to jury trial under the Seventh Amendment, the focus is on whether that claim or issue was triable by jury at common law or is analogous to one that was. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 378 (1996). For this purpose, courts compare "the

action in question to 18th-century actions brought in the courts of law and equity." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989).

An action for inverse condemnation based upon an alleged regulatory taking did not exist, as such, when the Seventh Amendment was adopted. However, as the term "inverse condemnation" would suggest, the nature of an inverse condemnation claim is an alleged appropriation of private property by a governmental entity for which compensation must be paid. As such, inverse condemnation proceedings are equivalent to actions by which a government affirmatively exercised its power of eminent domain to acquire private property.

The Court has consistently recognized that there is no common law right to jury in eminent domain proceedings.<sup>5</sup> *United States v. Reynolds*, 397 U.S. 14, 18 (1970) ("it has long been settled that there is no constitutional right to a jury in eminent domain proceedings."); *Bauman v. Ross*, 167 U.S. 548, 593 (1897) ("By the constitution of the United States, the estimate of the just compensation for property taken for public use, under the right of eminent domain, is not required to be made by a jury . . .").

Courts have reached this conclusion because the practice both in England and in the majority of the thirteen colonies for the assessment of compensation where property was taken for public use did not involve a

<sup>5</sup> For the purposes of deciding whether a claim or issue is properly decided by a jury, the focus is not simply whether an analogous proceeding existed at common law, but whether that analogous proceeding was decided by a jury at common law. See, e.g., *Atlas Roofing Co. v. Occupational Safety Comm'n*, 430 U.S. 442, 458 (1977) ("Condemnation was a suit at common law but constitutionally could be tried without a jury.").

common law jury of twelve presided over by a judge. See *United States v. Reynolds*, 397 U.S. 14, 18 (1970); *Chicago B & Q R. Co. v. Chicago*, 166 U.S. 226, 245 (1897); see also 1A Nichols, *The Law of Eminent Domain*, § 4.105 [1] at 4-137 (3rd ed. & 1992 Supp.); Note, *Federal Condemnation Proceedings and the Seventh Amendment*, 41 Harv. L. Rev. 29, 32-38 (1927). Consistent with the analysis employed in federal courts, the overwhelming majority of state courts have also concluded that these state constitutional provisions that protect or preserve the right to jury trial existing at common law do not apply to condemnation proceedings. 1A Nichols, *The Law of Eminent Domain* § 4.105[3] at 4-146 n.20 (3rd ed. & 1992 Supp.); see also *Hensler v. City of Glendale*, 8 Cal. 4th 1, 15 (1994), cert. denied, 115 S. Ct. 1176 (1995); *Rueth v. State*, 596 P.2d 75, 94 (Idaho 1978).

That inverse condemnation actions are initiated by the property owner, rather than by the government, does not change their nature. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) ("The fact that condemnation proceedings were not instituted and that the right [to just compensation] was asserted in suits by the owners did not change the essential nature of the claim.") (quoting *Jacobs v. United States*, 290 U.S. 13, 16 (1933)); see also *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932). Accordingly, for purposes of determining whether there exists a right to jury trial for inverse condemnation claims brought under Section 1983, the most analogous type of proceeding is that involving the exercise of the power of eminent domain actions. See *City of Northglenn v. Grynberg*, 846 P.2d 175, 178 (Colo.), cert. denied, 510 U.S. 815 (1993) (trial court decides inverse condemnation liability issue; "Because an inverse condemnation action is based on the 'takings' clause of our



constitution, it is to be tried as if it were an eminent domain proceeding.").

This rationale has been adopted by the Eleventh Circuit in *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1092 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2514 (1997). In that case, the court held that there was no right to have a jury decide liability issues in a regulatory takings context. In reaching this result, the Eleventh Circuit reasoned that it had "discovered no indication that the rule in regulatory takings cases differs from the general eminent domain framework, in which issues pertaining to whether a taking has occurred are for the court while damage issues are the province of the jury." *Id.*

The establishment of a federal right to jury trial in inverse condemnation cases would not only be unsupported by reference to common law practice, but would also potentially conflict with the procedures employed in many states and give rise to anomalous results. Under ripeness principles, an aggrieved property owner is ordinarily required to have its regulatory takings claim adjudicated in state courts, at least initially.<sup>6</sup> However, in most states, including California, courts and not juries, are responsible for deciding whether a regulatory taking has occurred. *Hensler v. City of Glendale*, 8 Cal 4th 1, 15 (1994), *cert. denied*, 115 S. Ct. 1176 (1995). Under these circumstances, creating a federal right to jury determination of regulatory takings issues would be either meaningless (because those issues will be conclusively decided

<sup>6</sup> Del Monte Dunes was not required to pursue remedies in state court before filing this federal action because, at the time of the alleged taking, it was not established that a damage remedy was available in California courts. *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990).

by state courts under applicable state procedures) or disruptive to state court proceedings (if the federal right to jury impairs the preclusive effect of the state court adjudication).

### 3. The Ninth Circuit's Analysis Misconceives the Constitutional Origins and Nature of Regulatory Takings Claims.

In concluding that there was a right to have juries decide inverse condemnation claims, the Ninth Circuit analogized regulatory takings to common law actions for trespass and focused upon the availability of a "damage" remedy in the form of just compensation. This analysis is flawed.

A regulatory taking claim is not analogous to common law trespass. Whereas common law trespass involves the wrongful physical interference with property rights, regulatory takings do not. Regulatory takings do not involve physical dispossession or damage to property. Nor does a regulatory takings claim depend upon a showing of wrongful or tortious conduct. Rather, a regulatory takings claim provides a means to ensure that the impact of governmental regulation or action is not borne disproportionately by individual property owners. *Agins*, 447 U.S. at 260.

Significantly, the primary authority cited by the Ninth Circuit to support its effort to analogize regulatory takings claims to common law trespass was *Beatty v. United States*, 203 F. 620, 626 (4th Cir. 1913), *writ of error dismissed and cert. denied*, 232 U.S. 463 (1914). However, the *Beatty* decision is inconsistent with pronouncements of this Court regarding the availability of jury trial in the

condemnation context and has been overruled by implication by subsequent decisions in the Fourth Circuit. *United States v. Keller*, \_\_\_ F.3d \_\_\_, 1998 W.L. 199713 (4th Cir. 1998); *United States v. 21.54 Acres of Land*, 491 F.2d 301, 304, 306-307 (4th Cir. 1973). The flaw in analogizing inverse condemnation claims to trespass claims improperly ignores both the Fifth Amendment origin of those claims and the well-documented absence of a common law right to have a jury resolve issues arising out of takings by the government.

The Ninth Circuit's emphasis on the availability of a monetary remedy in inverse condemnation actions is also misplaced. In some circumstances, courts rely on the nature of the remedy in analyzing the right to jury under the Seventh Amendment. When the right to jury depends upon whether the cause of action can most accurately be characterized as one "at law" rather than "in equity," this focus upon remedy and the availability of damages is appropriate. However, in considering inverse condemnation claims, the distinction between law and equity and the focus on remedies are largely irrelevant. They are irrelevant because historically condemnation matters were not triable by jury *despite* the availability of a just compensation remedy.

**B. The Nature of The Liability Issues That Must Be Resolved in a Regulatory Takings Case Provides a Separate Reason Why Those Issues Are Not Properly Decided by a Jury.**

Aside from the absence of any right to jury trial in condemnation proceedings in general, there is a second, independent reason why juries should not be permitted to determine whether a regulatory taking has occurred. It

is well settled that, in determining the proper role of juries, the inquiry does not stop with whether the claim is one in which the jury played a role at common law. Rather, even assuming that the jury has some role, it is necessary to determine whether the particular issues in dispute are properly triable by the jury. *See Markman*, 517 U.S. at 376. In making this inquiry, the test is "whether the jury must shoulder this responsibility [to decide the issue] *as necessary to preserve the substance of the common-law right of trial by jury.*" *Id.* at 377 (emphasis in original).

In the present case, the jury was asked to determine two separate theories of takings liability: a) whether the City's action substantially advanced a legitimate purpose; and b) whether the City's denial of the 190 unit project deprived the subject property of all economically viable use. Each of these issues is predominantly legal and must be resolved by the courts to ensure that takings standards are applied consistently and with due regard to the limited role of the Constitution in local land use decision-making.

**1. Courts, and Not Juries, Must Decide the Predominantly Legal Issue of Whether a Local Regulation or Land Use Decision Substantially Advances a Legitimate Public Purpose.**

More than seventy-five years ago, the Court first extended the Fifth Amendment beyond cases involving direct appropriation of property or its functional equivalent. *See generally Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Since that time, this Court has stated on several occasions that a regulatory taking will occur if a governmental regulation or action does not substantially



advance a legitimate public purpose. *Agins*, 447 U.S. at 260. In these prior decisions, the Court has not expressly addressed the issue of whether this component is one of fact for resolution by juries or one of law for courts. However, the nature of this issue and the analysis employed by courts in the takings and analogous substantive due process contexts lead to the inescapable conclusion that courts, and not juries, must decide this issue.

That courts should decide whether governmental regulations substantially advance a legitimate public goal derives, in substantial part, from the nature of the inquiry. A claim that a governmental regulation does not bear the requisite relationship to a legitimate objective does not contemplate a reweighing of the information available to the governmental agency or a redetermination of the wisdom or correctness of that regulation. Rather, the focus is upon the existence of facts or circumstances sufficient to demonstrate that the challenged action was not arbitrary and that the governmental agency had some basis for its action. *Agins*, 447 U.S. at 261; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1579-1580 (10th Cir. 1995); *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 169 (4th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992). By its nature, this is a predominantly legal issue. Courts apply this sort of limited review in a variety of contexts and have developed substantial institutional competence in doing so. By way of contrast, juries are not customarily called upon to review the factual basis for governmental regulations or decisions or to apply deferential standards of review.

In light of the deferential, predominantly legal nature of this inquiry, it is not surprising that, in applying this standard, courts have almost invariably resolved this issue as one of law. In case after case, the issue of whether a regulation substantially advanced a legitimate public purpose has been decided by courts as a matter of law. *See, e.g., Goldblatt v. Hempstead*, 369 U.S. 590, 595-96 (1962); *Agins*, 447 U.S. at 260-263; *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978). In all such cases, the courts concluded that the challenged regulation satisfied the deferential standard of liability and could not be said to constitute a taking on this basis. Even when the takings issue was reviewed following a trial of some sort, this Court has treated the issue as one of law and accorded little or no deference to the lower court's determination. *See, e.g., Penn Central Transp. Co.*, 438 U.S. at 130-31.

The conclusion that the "substantially advance" test under the takings clause is a predominately legal issue for resolution by the courts is reinforced by the courts' treatment of analogous or equivalent substantive due process challenges to state and local regulations.<sup>7</sup> The component of a takings analysis which requires that a regulatory action substantially advance a legitimate public purpose has its origin in substantive due process

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<sup>7</sup> While the Court has stated that a taking can be found if a regulation does not substantially advance a legitimate public purpose, it has never so held. The City concurs with arguments made by amici that this analysis has its origin in substantive due process precedent and principles and is indistinguishable from a substantive due process analysis in the context of a regulatory denial of a permit.

principles and precedents. The cases articulating and discussing this component of takings analysis frequently cite and rely upon substantive due process standards and precedent. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-35 (1987) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), a due process case using "arbitrariness" standard of review); *Agins*, 447 U.S. at 260 (citing *Village of Euclid*, *supra*, and *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928), a due process case using "arbitrary and irrational" standard of review); *Bickelstaff Clay Products v. Harris County, Georgia*, 89 F.3d 1481, 1489-1490 (11th Cir. 1996); *McDougal v. County of Imperial*, 942 F.2d 668, 677 (9th Cir. 1991) (noting the Supreme Court's use of *Village of Euclid* in *Agins* and *Nollan*).

In the substantive due process context, the federal courts have recognized that whether there is a rational basis for land use decisions is a mixed question of fact and law to be decided by the courts. See, e.g., *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1091 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 2514 (1997); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221-22 (6th Cir. 1992); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1578 (11th Cir. 1989); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988); see also *Midnight Session, Ltd. v. City of Philadelphia*, 945 F.2d 667, 682 (3rd Cir. 1991), *cert. denied*, 503 U.S. 984 (1992).

Important functional considerations also support entrusting to the courts the responsibility for determining whether a challenged regulation or action substantially advances a legitimate public purpose. As the Court explained in *Markman*:

Where history and precedent provide no clear answers, functional considerations also play

their part in the choice between judge and jury to define terms of art. We said in *Miller v. Fenton*, 474 U.S. 104, 114 (1985), that when an issue "falls between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."

*Markman*, 517 U.S. at 388.

As was true in *Markman*, determining that there is some legal basis for governmental actions is "one of those things that judges often do and are likely to do better than juries unburdened by training in exegesis." *Id.* Moreover, giving courts the responsibility for such decisions is more likely to promote consistency in decision-making which is an "independent reason" to give such responsibility to the courts. *Id.* at 390; see also *Ornelas v. United States*, 517 U.S. 690, 697-698 (1996) (whether probable cause existed was mixed question of fact and law that would be reviewed *de novo* by the appellate courts so as to facilitate consistency and clarity of constitutional principles).

The present case illustrates the institutional limitations of the jury and how permitting juries to decide constitutional issues as a purely factual matter will result in confusion and uncertainty. The jury in this case may have found an unconstitutional taking because it concluded that the City's denial of the proposed development did not bear a reasonable relation to legitimate environmental protection or health and safety goals. Yet, as is typical, the jury's verdict provides no insight or guidance as to why it reached this conclusion. Thus, if this City or other public agencies were faced with future



applications to develop this property or other property in similar circumstances, those public agencies would have no way of knowing what criteria to employ to avoid liability. Judicial resolution of inverse condemnation liability issues would result in an opinion or findings setting forth the basis of the decision, which would provide guidance to the City and other public agencies and a meaningful basis for appellate review.

Treating the issue of whether a regulation substantially advances a legitimate public purpose as one of law would also minimize inconsistent application of constitutional principles. Suppose, for example, two cities deny two identical developments based upon inadequacies in two identical restoration plans. If juries are allowed to decide liability issues as a question of fact, two separate trials could result in one finding that the denial is a taking and another that the denial is not a taking. Yet, if the issue is treated as a factual matter, both of these decisions may be sustainable on appeal, leaving directly inconsistent results. No such anomaly is likely to arise if the issue is treated as one of law.

## **2. The "Economically Viable Use" Test of Inverse Condemnation Liability Is Properly Decided by the Court Rather Than the Jury.**

Even if reasonably related to a legitimate interest, a governmental action or regulation may result in a taking if it deprives a property owner of all economically viable use of that property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992). "The principle that underlies this doctrine is that, while most burdens consequent upon government action undertaken in the public interest

must be borne by individual landowners as concomitants of the advantage of living and doing business in a civilized community, some are so substantial and unforeseeable, and can so easily be identified and redistributed, that justice and fairness require that they be borne by the public as a whole." *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14 (1984) (internal quotations omitted). Although the underlying principle is easy enough to articulate, applying the principle "has proved to be a problem of considerable difficulty." *Penn Central Transp. Co.*, 438 U.S. at 123.

There is no "set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government rather than remain disproportionately concentrated on a few persons." *Id.* at 124. Rather, the circumstances of each case must be evaluated. "[J]udicial determinations have relied on ad hoc factual inquiries and case-specific weighing of the competing public and private interests. Resolution of each case 'ultimately calls as much for the exercise of judgment as for the application of logic.'" *Armour and Co., Inc. v. Inver Grove Heights*, 2 F.3d 276, 278 (8th Cir. 1993) (internal citation omitted).

The Court has identified three factors to be especially considered in conducting this ad hoc analysis: (1) the economic impact of the challenged action, (2) the extent of interference with distinct investment-backed expectations and (3) the character of the governmental action. See *Connelly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1985); *Penn Central Transp. Co.*, 438 U.S. at 124; *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1072 (11th Cir.), cert. denied, 118 S. Ct. 441 (1996); *Armour and Co., Inc.*, 2 F.3d at 278. The Court has never expressly decided

whether courts or juries are responsible for evaluating these factors and applying this test. Everything in the Court's jurisprudence in this area, however, suggests that the question must be one for the courts, not juries.

On its face, it would appear that evaluation of the economic impact of the challenged action is a type of inquiry that could be appropriate for either courts or juries. However, closer analysis reveals a judicial gloss applied to this term, which makes the inquiry neither simple nor jury friendly. The threshold issue of any economic impact analysis is necessarily the legal impact and limitations imposed by the challenged regulations or action. Whether this threshold issue involves construction of a zoning ordinance, an administrative regulation or a conditional use permit, it is decidedly a legal rather than factual matter.

Even beyond the threshold issue of the legal impact of the challenged regulation, entrusting economic impact issues to a jury would be problematical. Superficially, determining the existence of an "economically viable use" would appear to be purely a matter of economic analysis. However, this is not the case. It is settled that a regulatory takings is not to be determined based on the impact on expected profits. See *MacLeod v. Santa Clara County*, 749 F.2d 541, 548 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009 (1985). It is also settled that the absence of economically viable use cannot be established by showing diminution in value caused by the regulation, even if that diminution is very substantial. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596 (1962) (80% diminution in value); *Village of Euclid*, 272 U.S. at 384 (75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 404-08 (1915) (87.5% diminution); *William C. Haas & Co. v.*

*City & County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980) (affirming summary judgment for defendant despite 95% diminution); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1031 (3rd Cir.), *cert. denied*, 482 U.S. 906 (1987) (89% diminution). Because the meaning of "economically viable use" and the types of impacts that will constitute a taking are not susceptible of clear definition, there is no simple legal formulation or standard that can be meaningfully applied by a jury.

The second factor to be considered, the extent to which the regulation interferes with "distinct investment-backed expectations," is similarly beyond the purview of factual questions appropriate for jury determination. "A 'reasonable investment backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) "Reasonable expectations must be understood in light of the whole of our legal tradition." *Lucas*, 505 U.S. at 1035 (Kennedy, J. concurring). Were this not the case, perhaps juries could reasonably be expected to fix the meaning of this factor. But juries are ill-suited to the task of evaluating the regulatory climate and assessing, as a matter of law and policy, whether a particular landowner had a "distinct investment-backed expectation." See, e.g., *Concrete Pipe Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993) (no reasonable expectation in light of Congressional legislation in pension field); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 985, 1005-06 (1984) (no reasonable expectation that EPA would keep submitted data confidential, in light of prior legislative amendments); *Golden Pacific Bancorp v. United States*, 15 F.3d 1066, 1074 (Fed. Cir.), *cert. denied*, 513 U.S. 961



(1994) (no reasonable expectation that Federal Deposit Insurance Corporation would not take over insolvent bank).

The final factor, requiring evaluation of the "character" of the governmental action, is likewise most appropriately assigned to courts. For example, even if a regulatory action deprives property of all economically viable use, it is still necessary to consider whether the regulation can be upheld because the circumstances prompting the regulation amount to a public nuisance. *Lucas*, 505 U.S. at 1031. This inquiry "will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question and the relative ease with which the alleged harm can be avoided . . . ." *Id.* at 1030-31 (citations omitted). Given the nature and complexities of this analysis, it is not surprising that courts, rather than a jury, are normally charged with determining the existence of a public nuisance. See *Tull*, 481 U.S. at 423.

The approach taken by courts in evaluating whether state or local regulations have confiscatory impacts in other contexts demonstrates that the takings inquiry is a hybrid of questions of fact and questions of law. For example, the Fifth Amendment prohibits a state or local government from imposing limits on rates or rents that are so unjust as to be confiscatory. See *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (state regulation of utility rates); *Kavanan v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 763 (1997) (local regulation of rents). While

the inquiry into the confiscatory impact of such regulations is necessarily very fact-oriented, the notion of submitting such issues to juries for resolution as a purely factual matter makes no sense. As a result, courts have decided and reviewed this issue as one of law. See, e.g., *Duquesne Light Co.*, 488 at 307.

## II. THE NINTH CIRCUIT'S DECISION THAT A TRIER OF FACT CAN DETERMINE INVERSE CONDEMNATION LIABILITY BY REWEIGHING CONFLICTING EVIDENCE FUNDAMENTALLY ALTERS THE ROLE OF THE CONSTITUTION IN THE REVIEW OF LOCAL LAND USE POLICIES AND DECISIONS.

The Ninth Circuit's decision in this case fundamentally changes and expands the role of the Fourteenth Amendment and Section 1983 in the review of local land use policies and decisions. It does so by changing the standard of constitutional review for regulatory takings cases from one which requires only that a challenged action sufficiently relate to a valid public purpose to one of "reasonableness" with the jury free to find inverse condemnation liability if it disagrees with the conclusion reached by the local public entity based upon essentially the same evidence.

As discussed above, this Court has stated that, in a regulatory takings context, inverse condemnation liability exists if a challenged regulation or action fails to substantially advance a legitimate public purpose. *Agins*, 447 U.S. at 260. Neither *Agins* nor subsequent cases have elaborated on the application of this test in the regulatory takings context. However, nothing in *Agins* suggests that the Court intended to fundamentally change the deferential approach that federal courts have historically accorded to local land use regulations. In fact, *Agins* cited

approvingly the "seminal" case of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), in which the Court explained that a land use ordinance would not be declared unconstitutional unless "such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." 272 U.S. at 395. (emphasis supplied) Essentially, *Agins* took the *Euclid* "no substantial relation" language and restated it as an affirmative standard that regulations should "substantially relate" to a legitimate state interest.

Subsequent to *Agins*, courts in regulatory takings cases have generally repeated the *Agins* "substantially advance a legitimate state interest" test rather than describing their review in substantive due process terms. However, regardless of whether the standard of constitutional review described in *Agins* was intended to differ from the standard formulated and applied in the substantive due process context, the change in the precise formulation of the standard did not eliminate the deference that the federal courts had traditionally given to local land use decision-makers. *Esposito*, 939 F.2d at 169 (sand dune protection upheld; "we view the matter as one in which [s]tate legislatures . . . who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require."). This deference does not derive from the specific constitutional provision (takings versus due process), but from principles of federalism and the limited role of the Constitution and the federal courts in the review of local legislature and administrative land use decisions. Simply put, it is the responsibility of local governments to determine policy, evaluate competing concerns and conflicting information, and make land use decisions. The

Constitution does not contemplate that this responsibility will pass to the federal courts (or federal juries) merely because the decision is subject to constitutional challenge. See *Village of Belle Terre v. Borass*, 416 U.S. 1, 8 (1973); *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927).

For this reason, in addressing "takings" or substantive due process challenges, courts do not conduct *de novo* inquiries into the merits of land use regulations or the correctness of governmental decisions that such regulations are appropriate. Rather, courts employ deferential standards of review and require only that there be some basis to support the local government's decision. See *Pearson*, 961 F.2d at 1222 ("The federal court may make only the most limited review of the evidence before the state administrative agency.") (emphasis in original).

As discussed above, the deferential nature of the review to be given to local land use regulations and decisions was one of the reasons that regulatory taking liability issues are predominantly legal and are to be decided by courts. Here, however, the Ninth Circuit not only upheld the use of a jury to decide such liability issues but compounded this error by treating the liability issue as a purely factual inquiry into the reasonableness of the City's decision based upon the jury's *de novo* review of the evidence. As to each reason by identified in the City's denial of the proposed development, the Ninth Circuit described the conflicting evidence and upheld the jury decision because Del Monte Dunes had presented some evidence sufficient to rebut each of the City's reasons. Pet. App. 17-19.

The Ninth Circuit's decision fundamentally changes the traditionally deferential approach applied to local land use decisions. In effect, the panel's decision would



allow any jury to become a substitute city council with the power to impose constitutional liability if it chooses to reject evidence supporting the local decision and to accept other evidence that the legislative or quasi-legislative body found unpersuasive.

In the present case, for example, the record demonstrates that the City Council was presented with substantial evidence from state and federal regulatory bodies and others that the proposed development would harm sensitive habitat and that the final restoration plan proposed by Del Monte Dunes would not adequately mitigate that harm. Among other things, in a letter presented to the City Council during the public hearing process, the Assistant Regional Director of USFWS advised the City Council that "[o]ur position has been clearly stated - the project will destroy most, if not all of the Smith's blue butterflies (SBB) and their host plants on the site (p. 6), and the final restoration plan will not likely succeed in replacing lost habitat or preserving SBB at the location." Jt. App. 150. At that same hearing, a Cal DFG representative advised the City Council that his department still had problems with the project and that "the restoration plan [had] not been approved." Jt. App. 288. Prior input from a habitat expert, Dr. Richard Arnold, had raised these same concerns over the measures proposed by Del Monte Dunes to mitigate environmental damage. Jt. App. 145-46. While Del Monte Dunes witnesses conceded that the subject property raised important environmental issues, they presented their views that the restoration plan was adequate.

Under the approach traditionally applied in reviewing land use regulations, the focus would be whether the City's action (denying the development) had a sufficient

relationship to environmental protection goals, and the City's action could not be found unconstitutional merely because a court (or jury) chose to accept the property owner's evidence that the owner had adequately mitigated the environmental impacts. However, in upholding the jury's verdict the Ninth Circuit concluded that "the jury was entitled to credit Del Monte's experts, and discredit the City's testimony."<sup>8</sup> By establishing a new standard of liability that permits a jury to reweigh the evidence and *de novo* determinations as to the reasonableness of the City's decision, the panel has fundamentally and erroneously changed the scope of constitutional review of local land use decisions.<sup>9</sup>

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<sup>8</sup> In its opinion, the Ninth Circuit suggested that there was evidence that the City had "already approved Del Monte's environmental restoration plan in 1984. . . ." Pet. App 17. This is simply wrong. As noted above, in approving the site plan in 1984, the City Council and staff made very clear that there was insufficient information at that time to approve or disapprove the preliminary restoration plan. Jt. App. 273-80. The CUP granted in 1984 expressly conditioned approval of the development upon the development of an adequate restoration plan. Jt. App. 60-65.

<sup>9</sup> Similarly, the jury was allowed to determine, as a factual matter, that the City could not constitutionally reject Del Monte Dunes' proposal because the City did not want to obligate itself to condemn private property for Del Monte Dunes' benefit. The City required Del Monte Dunes to have a secondary, emergency accessway for the proposed development. To obtain this accessway, Del Monte Dunes needed to acquire an easement from the owner of the neighboring property but had taken no steps to do so. R. 286. Instead, Del Monte Dunes apparently expected that the City would condemn this property. However, the City Council was reluctant to use its condemnation power for the benefit of a private developer. Jt. App. 289-90. The City therefore rejected the proposal because it failed to provide the

The Ninth Circuit's adoption of a *de novo* reasonableness test as the constitutional standard of review has implications for virtually all land use decisions made by public agencies. Almost invariably, significant development proposals will raise a number of legitimate public concerns and the information considered by the local decision-making body will be in conflict as to the magnitude of these concerns and the extent to which they have been mitigated. For example, a city may believe that a new proposed development will cause serious traffic problems that have not been adequately mitigated by proposed developer-paid roadway improvements. The Ninth Circuit's standard would allow any party to mount a successful constitutional challenge to any denial of a project merely by showing that the local decision-maker acted unreasonably in rejecting the evidence favoring development.

The extraordinary result of the panel's application of this new standard is made stark by comparing the panel's review of the jury's decision with the district court's decision on the analogous substantive due process claim, which was not challenged by Del Monte Dunes on appeal. Based upon the same evidence considered by the jury, the district court decided, as a matter of law, that the City had not acted arbitrarily and "was not attempting to forestall all reasonable development." The district court concluded that the City was acting in good faith and that

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required secondary accessway. Tr. Exh. 151. By virtue of the *de novo* approach upheld by the Ninth Circuit, the jury was allowed to countermand this policy decision and determine that the City had acted unconstitutionally in refusing to condemn property for Del Monte Dunes' benefit.

there was substantial evidence supporting the City's concern that habitat protection concerns had not been met. Pet. App. 36-43. This conclusion is not surprising inasmuch as both Cal DFG and USFWS raised questions concerning the adequacy of the final restoration plan proposed by Del Monte Dunes. The information and conclusions of these agencies, which possess special expertise in such matters, provided a more than ample basis to support the City Council's decision under the traditional, deferential standard. Yet, the Ninth Circuit allowed the jury finding of inverse condemnation liability to stand merely because Del Monte Dunes had presented evidence (apparently accepted by the jury) that the City's decision was unreasonable.

### III. THE NINTH CIRCUIT'S DECISION CONSTITUTES AN ERRONEOUS AND UNWARRANTED EXPANSION OF THE ROUGH PROPORTIONALITY TEST ADOPTED BY THIS COURT IN *DOLAN V. CITY OF TIGARD*.

While the jury was asked in jury instructions to determine whether the City's action bore a reasonable relationship to any legitimate public purpose, the Ninth Circuit's decision upholding inverse condemnation liability did not apply this standard. Rather, the Ninth Circuit imposed a new and different standard based upon *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which was decided by the Supreme Court months after the jury reached its verdict in the present case.<sup>10</sup> The Ninth

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<sup>10</sup> The Ninth Circuit's reliance on the decision in *Dolan* was unexpected, to say the least. Neither side had cited *Dolan* in their respective Ninth Circuit briefs prior to the issuance of the Ninth Circuit decision.



Circuit concluded that the City's action must not only further a legitimate public purpose, but that the action must also be "roughly proportional" to that purpose. Pet. App. 16 ("Even if the City had a legitimate interest in denying Del Monte's development, its actions must be 'roughly proportional' to furthering that interest.").

As a matter of law, the panel's extension of the *Dolan* holding into the regulatory takings context of the present case was inappropriate. *Dolan* arose in the context of a land use decision that had required that a landowner dedicate property to a public entity. *Dolan* provided a standard for determining whether such a dedication would be excessive. Central to the *Dolan* analysis is the distinction between governmental action which regulates property uses and governmental actions that require that an interest in the property be dedicated to the public agency. As the Chief Justice explained in *Dolan*:

The sort of land use regulations discussed in the [regulatory takings] cases just cited . . . differ from the present case. . . . [T]he conditions imposed were not simply a limitation on the use petitioner might make of her own parcel but a requirement that she deed portions of her property to the city.

512 U.S. at 385.

The distinction made in *Dolan* between property regulation, on the one hand, and development conditions requiring the actual conveyance of property interests, on the other hand, was previously emphasized by this Court in *Nollan*. In *Nollan*, this Court explained that "[w]e are inclined to be particularly careful about the adjective [substantial] where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the

purpose is avoidance of the compensation requirement, rather than the stated police power objective." 483 U.S. at 841.

In articulating its rough proportionality standard, *Dolan* expressly held that the city in that case "must make some sort of individualized determination that the required dedication related both in nature and extent to the impact of the proposed development." 512 U.S. at 391. By its express terms, this standard was applied only to a required dedication of property, and nothing in *Dolan* suggests that its holding changed the settled standard of inverse condemnation liability in regulatory taking cases that a challenged action need only bear a reasonable relationship to a legitimate public purpose.

Consistent with the language and rationale expressed in both *Dolan* and *Nollan*, the vast majority of federal courts have held that the *Dolan* standard is limited to the exactions context. See, e.g., *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1088 (11th Cir. 1996), cert. denied, 117 S. Ct. 2514 (1997) (distinguishing *Nollan* and *Dolan* as inapposite because in those cases the "state had demanded that a person open his or her property to the public . . ."); *Clajon Production Corp v. Petera*, 70 F.3d at 1578 ("Based on a close reading of *Nollan* and *Dolan*, we conclude that these cases (and the tests outlined therein) are limited to the context of development exactions where there is a physical taking or its equivalent.").

By applying a different and somewhat more exacting standard in cases involving required dedication of property, the *Nollan* and *Dolan* decisions were in accord with prior precedents, which consistently differentiated between physical takings and regulatory takings. Because

physical takings directly interfere with the actual ownership or physical possession of property, liability arises under the Fifth Amendment regardless of the public's benefits or the availability of remaining uses for the property. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Not surprisingly, courts have been careful to differentiate between physical takings and regulatory takings and to employ very different analyses in the two situations.

The required dedications of property that were being challenged in both *Nollan* and *Dolan* were somewhat akin to a physical taking. In each case, the Court emphasized that, absent some affirmative justification, a requirement that a property owner convey an easement to the public would constitute a taking. *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831. For this reason, this Court in *Dolan* deemed it appropriate to impose upon the public agency the burden of justifying the dedication requirement. This rationale does not apply in the context of a regulatory denial where there has been no required dedication of property or anything else akin to a physical taking. See *Garneau v. City of Seattle*, \_\_\_ F.3d \_\_\_, 1998 W.L. 214579 (9th Cir. 1998).

Aside from the important legal distinction between regulating property and requiring dedication of property interests, there are also practical reasons that the *Dolan* rough proportionality standard cannot be applied in a regulatory denial context. An essential prerequisite to application of the rough proportionality standard in *Dolan* is the ability to compare the expected impacts of a project to the particular dedication requirement imposed by the public entity. However, in cases involving a regulatory denial of a project, no such comparison can be

made. The denial may be based upon a myriad of factors or reasons that cannot be readily isolated from one another in the minds of the decision-maker. Even more importantly, however, assuming that each such concern could be isolated, there is no way to evaluate meaningfully the rough proportionality of a project's impact as to each such area of concern. Because there is no specific condition or dedication requirement being imposed in a regulatory denial context, the rough proportionality test is meaningless.

For example, a typical residential proposal will raise a number of possible concerns, including traffic, impacts on environment, increased demands on public services and other considerations. Suppose a city rejects a proposed development due to traffic concerns. As to such traffic concerns, there would be no way to compare the magnitude of the City's concern to the expected traffic burdens of the development for purposes of a rough proportionality test. For this reason, even assuming that it was feasible to treat separately each area of possible concern and to make an individualized determination of expected project impacts to the extent required by *Dolan*, the rough proportionality test cannot be applied in any meaningful way.<sup>11</sup>

The facts of the present case aptly illustrate the Ninth Circuit's error in applying the *Dolan* rough proportionality standard in a regulatory denial context. The City

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<sup>11</sup> Put otherwise, the rough proportionality test requires that X (the dedication condition) be roughly proportional to Y (the project impacts). In a regulatory denial context, while it would often be administratively burdensome, it may be possible to estimate project impacts (Y) for each area of concern. However, there is no X to which those impacts can be compared.



denied Del Monte Dune's proposed 190-unit development due to environmental and other concerns. The City Council concluded that the final restoration plan proposed by Del Monte Dunes was inadequate. The basis for that denial was not Del Monte Dunes' unwillingness to convey property interests demanded by the City.

The Ninth Circuit concluded the City had the obligation to show that its action (denial of the proposed development) was roughly proportional to the environmental protection concerns. However, even putting aside the fact that the *Dolan* rough proportionality standard was not established until after this case was tried, there is no way for the City to meet this burden. While the City could and did present evidence of the environmental significance of the subject property and the expected impacts of the project, the Ninth Circuit's standard of liability requires more. If the Ninth Circuit standard requires that the environmental concerns be roughly proportional to a decision denying *any* development on the subject property, the standard misconceives the City's decision, which was only to deny a specific proposed 190-unit development, including the specific habitat mitigation measure in the final restoration plan. On the other hand, if the Ninth Circuit standard would require that the environmental concerns be roughly proportional to the burdens imposed by a restoration plan that would be acceptable to the City, there is no way to apply this standard because the terms of any such acceptable plan are purely hypothetical.

Even assuming that some meaningful way of applying the rough proportionality standard to regulatory denial could be devised, doing so would constitute a major departure in the constitutional review of such decisions. Any dissatisfied property owner could challenge

rationally-based land use regulations or decisions that had appropriate goals by claiming that the concerns underlying the decision were not roughly proportional to the impacts of the proposed development. Thus, for example, a local decision to deny a project based upon concerns that the proposed project did not adequately address risks of earth movement could be constitutionally challenged on the ground that these concerns were not roughly proportional to the impacts of the project. Similarly, a regulatory decision that a proposed building had not mitigated seismic concerns could be rendered void unless the public agency established that its concerns or its design requirements were roughly proportional to the impacts of the project.

In and of itself, extending the rough proportionality standard into the context of regulatory denials would be an erroneous and unwarranted expansion of constitutional review over land use decision-making. When combined with the Ninth Circuit's application of a fact-based reasonableness standard of liability based upon *de novo* review of the relevant information considered by the public agency, the Ninth Circuit's decision would turn the federal courts (or juries) into land use planners and expose local agencies across the country to great uncertainty and unwarranted liability.

**CONCLUSION**

For all of the reasons set forth above, the City respectfully requests that the Ninth Circuit's decision in this matter be reversed.

Respectfully submitted,

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June 1998



16

Supreme Court, U. S.  
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**JUL 31 1998**

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**No. 97-1235**

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1997

CITY OF MONTEREY,

*Petitioner,*

vs.

DEL MONTE DUNES AT MONTEREY, LTD. AND  
MONTEREY-DEL MONTE DUNES CORPORATION,

*Respondents.*

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**BRIEF FOR THE RESPONDENTS**

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## QUESTIONS PRESENTED

1. (a) When a citizen sues a local government agency for damages under 42 U.S.C. § 1983, for a violation of federally protected rights, *may* a jury decide whether the government is liable, whatever the substantive constitutional or statutory rights invaded?

(b) May a municipal defendant in a § 1983 action for damages forbid a trial by jury?

2. In light of this Court's decisions in *Nollan v. California Coastal Commn.*, 483 U.S. 825, 841 (1987), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 (1992), and *Dolan v. City of Tigard*, 512 U.S. 374, 391, fn. 8 (1994), each of which concluded that purported "findings" made by state and local government agencies to support land use regulatory actions must be subjected to searching review to determine the validity of their bases, is it proper for the trier of fact in a regulatory taking case to review the reasonableness of such governmental action?

3. When local government regulates the use of land, must the extent of the regulatory restrictions imposed on the property be in proportion to the harm sought to be prevented?



**PARTIES TO THE PROCEEDING  
AND RULE 29.6 STATEMENT**

Respondents Del Monte Dunes at Monterey, Ltd. and Monterey Del Monte Dunes Corporation are affiliated with Borg Warner, a Chicago, Illinois company that has issued shares to the public.

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## STATEMENT OF THE CASE

This 42 U.S.C. § 1983 case was filed in U.S. District Court in 1986, when California courts provided no compensatory remedy for regulatory takings. California's erroneous rule of *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980) was not overruled by this Court until *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). Thus, in 1986, just compensation was available only in federal courts, under federal law.

The District Court initially dismissed the suit as unripe under *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). The Court of Appeals (Judges Hug, Tang, and Boochever) reversed, holding that, because five different plans had been denied by the City, the dispute was ripe for litigation. (*Del Monte Dunes v. City of Monterey*, 920 F.2d 1496 [9th Cir. 1990] [*Del Monte I*].) On remand, the jury decided in Del Monte's favor on the takings and equal protection claims and the court decided in the City's favor on the due process claim. That result was affirmed (Judges Wallace, Leavy, and Baird). (*Del Monte Dunes v. City of Monterey*, 95 F.3d 1422 [9th Cir. 1996] [*Del Monte II*].) This Court granted certiorari.

The City's factual statement (adopted by its seven *amici curiae* as well) omits virtually all reference to *Del Monte I* and the facts underlying it. Those facts, however, make clear why the jury, the trial Judge, and six appellate Judges all concluded that the City had unlawfully taken Del Monte's property.

The history of this case is accurately summed up in *Del Monte I* (920 F.2d at 1502-1503) (incorporated into the opinion under review here [95 F.3d at 1425]), and reflected in the evidence in the Joint Appendix. *Del Monte I* shows ripeness under *Williamson County*, as well as the intense planning done by Del Monte Dunes and its predecessor, Ponderosa Homes (collectively, Del Monte), in their efforts



to satisfy the City. But after years of effort, it became clear that the City, belying its repeated representations, really wanted to preserve this property undeveloped. (See JA 5, 192-193.)

The property is a 37.6-acre, roughly rectangular parcel of land on the Pacific Ocean coast at the northern end of the City of Monterey. (JA 11.) For many years (dating back to before World War II), it was a Phillips Petroleum Co. terminal and tank farm where large quantities of oil were delivered, stored, and re-shipped. (JA 13.) Thus, the record sometimes refers to it as the Phillips Petroleum parcel. When Phillips ceased using the property, it removed its large oil storage tanks, but left behind pieces of pipe, broken concrete, and oil that had soaked into the sand. (JA 13, 157, 171.) It was, in short, an abandoned industrial site that would need cleaning and restoration before it could be used for anything. (JA 211-212.) No matter how the City and its amici seek to cloak it in environmentally attractive descriptions, that remains the undeniable fact.<sup>1</sup>

In addition to the post-industrial debris (and trash that local citizens surreptitiously dumped on the site) (JA 211-212), Phillips Petroleum had left behind non-native ice plant, planted to prevent erosion around its oil tanks. (JA 212.) As ice plant covers the ground, it secretes a substance that forces out other plants (JA 21), including the native buckwheat, the only known habitat for an endangered insect known as Smith's Blue Butterfly (or SBB). There were scattered buckwheat plants on the property but, absent human intervention, the ice plant would wholly displace them. (JA

<sup>1</sup> Giving an environmental slant to the facts has become a favored tactic of pro-regulation advocates these days. See, e.g., Lazarus, *Litigating Suium v. Tahoe Reg'l Planning Agency in the United States Supreme Court*, 12 J. Land Use & Env'tl Law 179 (1997), in which counsel for the government in *Suium v. Tahoe Reg. Plan. Agency*, 520 U.S. \_\_\_, 137 L.Ed.2d 980 (1997) describes the way he spun the issue away from the constitutional issues at its heart and toward paeans to the beauty of Lake Tahoe.

213-214.) Although buckwheat is the natural habitat of the SBB, no eggs, larvae, or adults of the species were found during extensive searches of this property in 1981, 1982, 1983, and 1984 (JA 16); one SBB larva was found late in 1984 (JA 114); none in 1985 (JA 115). The SBB lives for only one week, travels 200 feet (maximum) and must land on a mature, flowering buckwheat plant in order to survive. (JA 219.) The site is quite isolated from other possible SBB habitats, so that travel to or from this property is unlikely, if not impossible. (JA 218-221.) Ironically, without Del Monte's project (that would remove all ice plant and sow additional buckwheat) the putative SBB habitat was about to be overrun and eliminated by ice plant. (JA 213-214.)

Before 1981, the City zoned the property for multi-family residential use, in keeping with the commercial, industrial, and multi-family residential uses virtually surrounding it — 29 units per acre, or more than 1,000 homes for the entire parcel. (JA 158.)

But the owners didn't ask for 1,000 units. Or anything close. Rather, in 1981, they submitted an application for only a 344-home development. The City's Planning Commission rejected the proposal. But the City went beyond mere denial, saying that a plan with only 7 units per acre, or 264 units, "would be received favorably." (*Del Monte I*, 920 F.2d at 1502.)<sup>2</sup>

So the owners, at considerable expense, redesigned the project accordingly, keeping in constant contact with the City's planners to ensure that their new plan would be appropriate. (JA 159.) In 1983, they submitted their plan for the 264 units the City said it wanted. However, the City

<sup>2</sup> That was in keeping with this Court's belief in *Williamson County* that planners would not merely deny applications, but indicate "how [the property owner] will be allowed to develop its property." (*Williamson County*, 473 U.S. at 190.) Please note that, without any pretense of changing the zoning, the City's planners arbitrarily announced that they wanted a development proposed at 1/4 the density allowed by law.

Planning Commission turned down the application. This time, the planners said that a 224-unit proposal "would be received favorably." (*Del Monte I*, 920 F.2d at 1502.)

The owners then complied with the City's 224-home demand. But when they took that one to City Hall, in early 1984, the same Planning Commission that solicited this proposal said "no." The owners appealed to the City Council, which remanded the matter to the Planning Commission with directions to consider a 190-unit development (*Del Monte I*, 920 F.2d at 1502), representing a further 15% reduction in homes and a corresponding 15% reduction in ground coverage. (JA 164.)

Back the owners went. Another redesign; another resubmittal; another Planning Commission denial; another administrative appeal to the City Council. The City Council again overruled the Planning Commission and approved the 190-unit development, using a plan that showed the size and shape of buildings, roads and open spaces (*Del Monte I*, 920 F.2d at 1502),<sup>3</sup> but with a surprise or two up the municipal sleeve.

The plan ostensibly approved by the City Council for this 37.6 acres had buildings and patios on only 5.1 acres, with another 6.7 acres in public and private streets (including public parking and accessways to the beach). The remainder was to be left open: 17.9 acres in public open space, and another 7.9 acres in landscaped areas. (JA 87.) In other words, contrary to the assertions of the City and its *amici*,

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<sup>3</sup> The City's brief sums up all that work and all those proceedings and its own direct participation in the planning of Del Monte's property with the bland phrase "[g]radually, Ponderosa [Del Monte's predecessor] scaled back its proposal." (City 5.) The City's summary fails to inform this Court of either its own actions or the events that caused a temporary taking *after five projects were turned down*.

This Court has noted the importance of such a "series of official actions" in determining § 1983 liability. (*Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 [1977].)

there were exactions galore in this project. The City insisted that Del Monte "give" it a large portion of the property for use as a public beach (including public access and parking), preserve the sand dunes to hide the homes from passing motorists, and to provide a buffer to separate the homes from the neighboring state beach.<sup>4</sup>

But the City Council's approval knowingly forced development into the "bowl" (or depressed) area in the property's center, that would have to be graded even deeper in order to comply with the City's order that no buildings be visible to motorists on the nearby highway. There were buckwheat plants in the bowl that would thus be destroyed. (JA 180, 184, 251-252.)

Then came the *coup de grace*. The City announced that the very place it had earmarked for the homes was also the *only* place to create a butterfly preserve for the SBB, even though none actually lived on the property. The City believed that if the remnants of the Phillips Petroleum tank farm were removed from the property, and the property cleaned, and the invasive ice plant removed, and the area seeded with buckwheat, then possibly some SBB would

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<sup>4</sup> In the teeth of that record, the American Planning Association brazenly asserts as fact that "[n]o dedication of land or exactions in lieu of dedication were imposed as project conditions by the City of Monterey" (APA, p. 17) and "[t]he City never attempted to coerce Del Monte Dunes into yielding some incident of ownership connected with its land." (APA, p. 18.)

Aside from its evident lack of familiarity with the record, APA's brief needs to be read with more than a grain of salt for a more unfortunate reason: this Court cannot be sure whether to trust APA's representations. APA recently "repudiate[d]" the *amicus* brief it filed here in *Suitum v. Tahoe Reg. Plan. Agency*, 137 L.Ed.2d 980, in a September 16, 1997, letter by its President to the Chairman of the House Judiciary Committee. APA's arguments to this Court in *Suitum* were being used in Congress to support legislation APA opposed. So APA simply disavowed what it solemnly told this Court in *Suitum*. With APA's analysis that transient, caution is warranted.



decide to live there.<sup>5</sup> However, in a classic Catch-22 move, the City refused to permit Del Monte to shift its development to any of the other parts of the property because the City had already earmarked the rest for public use or nonuse or acquisition (i.e., the beach, the dunes, and the State park buffer). (JA 250; R 487.) That left no place on the 37.6 acres on which to build *anything*. (R 203, 486-487.) The wipeout was total. As the Court of Appeals would later summarize it, "the City progressively denied use of portions of the Dunes until no part remained available for a use inconsistent with leaving the property in its natural state." (95 F.3d at 1433.)<sup>6</sup>

Del Monte then filed this action because, as in *Lucas*, 505 U.S. 1003, the City's actions had denied it all productive private use. Moreover, as Del Monte quickly learned, it could not sell the property in the open market either. In light of the City's actions, potential buyers disappeared. (JA 254-258.) The State of California then bought the property for less than half of its fair market value, with a non-negotiable, "take it or leave it" offer. (JA 259-260, 264.)<sup>7</sup>

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<sup>5</sup> The City simply ordered it prepared on the if-you-build-it-they-will-come theory of the movie "Field of Dreams." But this isn't Hollywood, it's real life, and this is an abandoned petroleum tank farm. Because of that, as the Solicitor General notes, the U.S. Fish and Wildlife Service commented that even complete elimination of this site would not threaten the survival of the SBB. (U.S. 3, fn. 2.)

<sup>6</sup> That's hardly the "'simpl[e] limitation on the use' of the property" portrayed by *amicus* League for Coastal Protection (p. 5).

<sup>7</sup> Under California law, when city confiscatory action causes a property owner to sell land at a loss, the owner is entitled "to recover from the City any loss sustained as a result . . ." (*City of Los Angeles v. Ricards*, 10 Cal.3d 385, 388, 515 P.2d 585 [1973].) This is a generally prevailing rule. (See, e.g., *Argier v. Nevada Power Co.*, 952 P.2d 1390 [Nev. 1998].) Although Del Monte was paid slightly more than it had paid for the property four years earlier, it received nothing for its carrying, planning, and legal costs, and it was stuck with the responsibility for cleaning environmental problems before the State would accept it. (R 518.)

After hearing this evidence, the jury found a temporary taking, as well as denial of equal protection of the laws.<sup>8</sup> It awarded \$1.45 million. The District Court would not allow damages for anything else including loss in the value of the property. (95 F.3d at 1425.) The Judge thereafter decided that the City's actions did not violate Del Monte's substantive due process rights (Pet. App. 41), while concluding that that did not conflict with the jury's verdict (Pet. App. 39). The Judge also denied the City's post-trial motions for entry of judgment as a matter of law and for a new trial (95 F.3d at 1425), thus accepting the jury's evaluation of the taking and equal protection issues. The Court of Appeals affirmed.

## SUMMARY OF ARGUMENT

In *Dolan*, 512 U.S. at 392, this Court admonished:

"We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation . . ."

In the teeth of that explicit pronouncement, the City asserts that Fifth Amendment rights should receive a lesser level of protection than others.

1. This is a civil rights case brought under 42 U.S.C. § 1983, not an "inverse condemnation" case. The City, acting under color of state law, failed in its legal duty to acquire the subject property, and denied Del Monte the Fifth

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<sup>8</sup> The equal protection violation was based on the substantially different treatment given Del Monte when compared to the industrial and high-density residential developments of adjacent properties. The Court of Appeals did not deal with this issue, as the legal ruling was duplicative of the taking issue.

Amendment's protection.<sup>9</sup> All § 1983 plaintiffs are entitled to be treated alike, as all are invoking the same statutory remedial scheme against local government entities and officials who violate federal constitutional or statutory guarantees, regardless of the nature of the violation.

All Circuit Courts have consistently held that § 1983 liability issues are for juries to decide; some have held that liability issues *must* be so decided. Until the City's bald assertion here, no one questioned this practice. This Court's jurisprudence assumes the propriety of jury trials. (See, e.g., *Jett v. Dallas Independent School Dist.*, 491 U.S. 701 [1989]; *Hetzel v. Prince William County*, 523 U.S. \_\_\_, 140 L.Ed.2d 336 [1998].)

The courts below were correct in ruling that it was not error to submit the liability issue to a jury. Section 1983 authorizes an "action at law," which implies that such actions should be tried to juries, as such actions are understood to mean those in which damages are awarded by juries. Beyond that, the Seventh Amendment authorizes a jury trial in this kind of action, because it protects the right to trial by jury in "suits at common law," another phrase commonly understood to mean suits that were of a type traditionally tried to juries. This Court treats § 1983 suits as "constitutional torts," i.e., suits in which liability turns on wrongful governmental conduct, not the specific federally protected rights that are violated. Tort actions for damages are the kind that would have been tried to a common law jury.

2. Land use decisions of local regulators are not immune from judicial review for constitutionality. That has always been true. (*Nectow v. City of Cambridge*, 277 U.S. 183 [1928].) The City and its *amici* ask this Court to revolutionize the field of land use law by creating some sort of

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<sup>9</sup> The Fifth Amendment right to just compensation was the first item from the Bill of Rights to be selectively incorporated into the Fourteenth Amendment's due process guarantee. (*Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 [1897].)

regulatory aristocracy whose decisions would be beyond judicial review. Their demand is for nothing less than a rule that no court — neither judge nor jury — can review what they have done and determine whether it is constitutionally permissible.

This Court has repeatedly told government agencies that their bare conclusions are not sufficient to justify regulations that stultify the use of land. (*Nollan*, 483 U.S. at 841, *Lucas*, 505 U.S. at 1031, and *Dolan*, 512 U.S. at 389-391.) As the Court of Appeals put it in *McDougal v. County of Imperial*, 942 F.2d 668, 676 (9th Cir. 1991):

"We cannot agree that any legitimate purpose automatically trumps the deprivation of all economically viable use, such that whenever a regulation has a health or safety purpose, no compensation is ever required even if the land owner is thereby denied all use of his property. We read the Supreme Court as requiring us to balance the strength of the public interest against the severity of the private deprivation."

That has always been the law, and the City has offered no legitimate reason why it should even be questioned, much less overturned.

3. It is entirely in keeping with American jurisprudence that land use restrictions be proportional to the detriment the regulators are seeking to prevent. Proportionality is central to our system of law in general, and it permeates the field of land use regulatory takings, as well. As *McDougal* put it, "we believe that a court is required to consider the nature as well as the legitimacy of the state's interest together with the nature and extent of its impact on the owner's use of his land." (942 F.2d at 676.) In other words, it is perfectly legitimate to ask whether the regulation is proportional to its stated goal, or whether the asserted harm justifies the regulation.

The City and its *amici*, however, insist on compartmentalizing takings law in ways this Court has never done. As



will be shown, this Court's takings decisions have always considered whether the means is proportional to the end. And they have done so whether the regulation required physical dedication of property or regulatory stultification of use.

In any event, the issue is academic. The jury was not instructed to consider proportionality, only reasonableness. (JA 304.) The Court of Appeals affirmed the jury's reasonableness determination and, beyond that, concluded that the City's actions were disproportional to its stated purpose. This was a fact-intensive case, and the City simply doesn't like the outcome. The issues it raises do not warrant reversal.

I.

**IN § 1983 CIVIL RIGHTS ACTIONS, JURIES  
CAN DECIDE LIABILITY ISSUES. DEFEN-  
DANTS HAVE NO RIGHT TO FORBID TRIAL  
BY JURY**

The City and its *amici* misfocus their analysis on the question of whether a § 1983 plaintiff has the right to a jury trial. Although Del Monte believes it would be appropriate for this Court to agree with all the Circuit Courts and so hold, it is not necessary to go that far to affirm the decision below. The Court of Appeals held only that "the district court did not err by allowing Del Monte's § 1983 action to be tried before a jury" (95 F.3d at 1428; emphasis added) because "it is the type of issue that *can* be put to the jury" (95 F.3d at 1430; emphasis added). The court below did *not* hold, as the City would have it, that all such cases must always be tried by a jury. The issue is *not* whether a jury *must* try this case, but whether it *may*. In order to prevail, the City must demonstrate that it has an absolute right *not* to have a jury decide the case, and that a jury trial in this case therefore constituted prejudicial error *per se*. Neither the City nor any of its numerous *amici* even attempt to make that argument. Nor could they — the law is to the contrary.

"[T]he right to jury trial is a constitutional one, . . . while no similar requirement protects trials by the court . . . ." (*Beacon Theatres v. Westover*, 359 U.S. 500, 510 [1959]; emphasis added; see 9 Wright & Miller, *Federal Practice and Procedure* § 2317 [2d ed. 1995].)

Curiously, the City framed the question properly as "[w]hether . . . 42 U.S.C. § 1983 requires that . . . liability issues be determined by the court rather than by a jury" (Br. for Pet., p. i; emphasis added), but its briefing is devoted to the converse, i.e., that Del Monte could not compel a jury trial. But, even were the City correct, it would not follow that trial of liability by the jury requires reversal. Any such asserted error had to be harmless because the jury reached the right result on these facts — and the trial court agreed when it denied the City's motion for new trial and motion for judgment as a matter of law. (Pet. App. 4.) The City got the same result from the judge as it did from the jury. It's a case of "no harm, no foul," even on the City's premise.<sup>10</sup>

The correct rule is: "Where an action at law is erroneously tried in equity, very different questions are raised

<sup>10</sup> As noted earlier, the trial judge concluded that the substantive due process issue was a legal one for his determination and he decided there was no such violation. Contrary to the City's view (City 42), however, that decision casts no doubt on the jury's verdict, as the questions were different. The due process issue only questioned whether there was any rational basis for the City's action. As discussed *infra*, p. 38, such a rational basis does not insulate the City from a Fifth Amendment taking challenge. In other § 1983 cases, the courts have experienced no discomfort in permitting juries to decide some issues and courts to decide other, seemingly parallel, issues, regardless of their possibly different outcomes. (E.g., *Kim v. Coppin State College*, 662 F.2d 1055 [4th Cir. 1981] [Title VII employment claims were for the court, § 1983 claims were for the jury]; *B.C.R. Transport Co., Inc. v. Fontaine*, 727 F.2d 7 [1st Cir. 1984] [criminal jury found search reasonable and convicted arrestee; § 1983 jury found it unreasonable and awarded same arrestee damages; both OK].)

upon appeal from those which arise where a suit in equity is erroneously tried at law. In the latter case the court, if satisfied that the proper result was reached, may treat the error as harmless. In the former, it must send the case back for a new trial, because of the constitutional guaranty of trial by jury." (*Great American Ins. Co. v. Johnson*, 27 F.2d 71 [4th Cir. 1928], cert. denied, 278 U.S. 629; emphasis added; see also *Hurwitz v. Hurwitz*, 136 F.2d 796, 798-799 [U.S. App. D.C. 1943]; *Turner v. Burlington Northern R. Co.*, 771 F.2d 341, 345, fn. 1 [8th Cir. 1985].)

The City and its amici also err in arguing as though this were an "inverse condemnation" case they are apparently used to facing in state courts. It is not. This is a federal statutory case brought under 42 U.S.C. § 1983 because the City, acting under color of state law, denied Del Monte rights protected by the Fifth Amendment.

As this Court has repeatedly stressed, a § 1983 case is a "species of tort liability,"<sup>11</sup> specifically, a statutorily created "constitutional tort"<sup>12</sup> that sweeps within its ambit all manner of governmental actions that defy Bill of Rights protections. Properly so. Section 1983 was intended to provide "a uniquely federal remedy" (*Mitchum v. Foster*, 407

<sup>11</sup> *Heck v. Humphrey*, 512 U.S. 477, 483 (1994); *Wyatt v. Cole*, 504 U.S. 158, 163 (1992); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305 (1986); *Smith v. Wade*, 461 U.S. 30, 34 (1983); *Owen v. City of Independence*, 445 U.S. 622, 635 (1980); *Carey v. Phipps*, 435 U.S. 247, 253 (1978).

<sup>12</sup> *Jefferson v. City of Tarrant*, 522 U.S. \_\_\_, 139 L.Ed.2d 433, 439 (1997); *Richardson v. McNight*, 521 U.S. \_\_\_, 138 L.Ed.2d 540, 545, 546 (1997); *McMillian v. Monroe County*, \_\_\_ U.S. \_\_\_, 138 L.Ed.2d 1, 7 (1997); *Johnson v. Jones*, 515 U.S. 304, 307 (1995); *Collins v. City of Harker Heights*, 503 U.S. 115, 121 (1992); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 477 (1986); *Polk County v. Dodson*, 454 U.S. 312, 326 (1981); *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978).

U.S. 225, 239 [1972]) with "broad and sweeping protection" (*Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 [1972] [quoting with approval]) "read against the background of tort liability that makes a man responsible for the natural consequences of his actions" (*Monroe v. Pape*, 365 U.S. 167, 187 [1961], overruled in part, to expand government liability, in *Monell*, 436 U.S. 658) so that individuals in a wide variety of factual situations are able to obtain a federal remedy when their federally protected rights are abridged (*Burnett v. Grattan*, 468 U.S. 42, 50, 55 [1984]). While read against the general common law tort background, "[t]he coverage of the statute [§ 1983] is . . . broader" (*Kalina v. Fletcher*, 522 U.S. \_\_\_, 139 L.Ed.2d 471, 477 [1997]), and must be broadly and liberally construed to achieve its goals (*Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 [1989]; *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391, 399-400 [1979]). "[T]he central purpose of the Reconstruction-Era laws is to provide compensatory relief to those deprived of their federal rights by state actors" (*Felder v. Casey*, 487 U.S. 131, 141 [1988]) by "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights" (*Mitchum*, 407 U.S. at 243). Simply put, when James Monroe sued Frank Pape, he was not suing for trespass and false arrest; he was suing for a violation of a federal constitutional right that, in that case, happened to implicate acts that were also trespass and battery under state law (see 365 U.S. at 169). The same is true here. Del Monte has sued *not* to vindicate state law (see Cal. Const., Art. I, § 19; Cal. Govt. Code § 7267.6), but to secure statutorily authorized redress for the violation of its federal rights secured by § 1983.

#### A. Juries Routinely Decide Liability In § 1983 Actions

The City and several of its amici apparently fear submitting the reasonableness of municipal land use actions to a



jury, as if trial by jury were some sort of social evil, rather than the bulwark of American liberties. (See, e.g., *Dimick v. Schiedt*, 293 U.S. 474, 486 [1935]; *Chauffeurs, Teamsters, etc. v. Terry*, 494 U.S. 558, 565 [1990].)<sup>13</sup> This elitist argument that juries are not competent to evaluate such issues (City 27-36; Municipal Art Society 12-13; National League of Cities 22) is without merit. It is particularly disingenuous in the field of planning and zoning, where so-called "ballot box zoning" (i.e., zoning enacted by citizens by initiative measures) is common. (E.g., *DeVita v. County of Napa*, 9 Cal.4th 763, 889 P.2d 970 [1995]; see *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 [1976].) If the California populace at large is thus deemed competent to make and enact complex land use decisions within the confines of a voting booth, how can it be argued with a straight face that specific members of the California public who are carefully selected, instructed and supervised by a federal judge, somehow lose that ability when seated in a jury box?

Moreover, complex issues are routinely submitted to juries,<sup>14</sup> particularly in § 1983 cases, in which juries have been called on to judge the reasonableness of a broad range

<sup>13</sup> Juries leaven the proceedings by injecting common sense into the balancing process. (See *United States v. Reynolds*, 397 U.S. 14, 23 [1970] [Douglas and Black, JJ., dissenting].) Additionally, as the California Supreme Court has noted, local government officials and local judges can have an unwholesome closeness. (*Garrett v. Superior Court*, 11 Cal.3d 245, 248, 520 P.2d 968 [1974].) Jurors can buffer that problem.

<sup>14</sup> E.g., *Beacon Theatres v. Westover*, 359 U.S. 500 (1959) (anti-trust). Even *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), relied on by the City and its amici, refused to establish a blanket rule that complex issues must be removed from juries. It only removed a discrete issue in patent cases, and expressly limited its decision to such cases. (517 U.S. at 383, fn. 9.) Whether removing that issue from juries had a salutary effect on patent law is apparently an open question. (See Fisk, "Confusion Follows '96 Landmark Patent Case," *The National Law Journal*, p. A1 [June 15, 1998].)

of municipal policies.<sup>15</sup> "Surely eminent domain is no more mystically involved with 'sovereign prerogative' than . . . a host of other governmental activities carried on by the States and their subdivisions which have been brought into question in the Federal District Courts . . ." (*County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 192 [1959].) As this Court put it after noting that § 1983 cases can present difficult problems, "judge and jury, doing their respective jobs, will be adequate to the task." (*City of Canton v. Harris*, 489 U.S. 378, 391 [1989].)

This Court had no question about the jury's role in § 1983 cases when it decided *Jett v. Dallas Independent School Dist.*, 491 U.S. 701 (1989):

"... the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge before the case is

<sup>15</sup> These include city budget policy (*Berkley v. Common Council*, 63 F.3d 295 [4th Cir. 1995] *en banc*), county law enforcement policy (*Turner v. Upton County*, 915 F.2d 133 [5th Cir. 1990]), municipal policy governing the use of force during arrests (*Beck v. City of Pittsburgh*, 89 F.3d 966 [3d Cir. 1996], *cert. denied*, 117 S.Ct. 1086 [1997]), county road acquisition policy (*Hammond v. County of Madera*, 859 F.2d 797 [9th Cir. 1988]), municipal employment policy (*Richardson v. Leeds Police Dept.*, 71 F.3d 801 [11th Cir. 1995]), city medical care policy (*Simmons v. City of Philadelphia*, 947 F.2d 1042 [3d Cir. 1991]), school district sexual abuse policy (*Gonzalez v. Ysleta Ind. School Dist.*, 996 F.2d 745 [5th Cir. 1993]), the conflict between a police department's chain-of-command policy and a township's sexual harassment policy (*Gares v. Willingboro Twp.*, 90 F.3d 720 [3d Cir. 1996]), and even the question whether "extortion of outsiders, businessmen, or developers . . . was 'the way things are done and have been done' in the Town" (*Roma Constr. Co. v. aRusso*, 96 F.3d 566 [1st Cir. 1996]). There has been no limit placed on the variety of local policies whose validity has been submitted to juries for review. Land use decisions and takings law are no more arcane in general, and are a lot less complex in this case than in some of those cited.

*submitted to the jury. . . . Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether their decisions have caused the deprivation of rights at issue.*" (*Jett*, 491 U.S. at 737; emphasis added.)

Nor did this Court have any question about the jury's role in *Hetzel v. Prince William County*, 523 U.S. \_\_\_, 140 L.Ed.2d 336 (1998), where the Seventh Circuit had reduced a jury's award. This Court reversed in order to preserve the § 1983 plaintiff's Seventh Amendment right to a jury trial. (140 L.Ed.2d at 339.)

Indeed, in a host of § 1983 cases reviewed by this Court after a trial on the merits, juries had regularly determined both liability and compensation issues. (See *Hetzel*, 523 U.S. \_\_\_, 140 L.Ed.2d 336; *Bogan v. Scott-Harris*, 523 U.S. \_\_\_, 140 L.Ed.2d 79 [1998]; *Board of County Comm'rs v. Brown*, 520 U.S. 397 [1997]; *Jaffee v. Redmond*, 518 U.S. 1 [1996]; *Helling v. McKinney*, 509 U.S. 25 [1993]; *City of Canton v. Harris*, 489 U.S. 378 [1989]; *Blanchard v. Bergeron*, 489 U.S. 87 [1989]; *City of St. Louis v. Praprotnik*, 485 U.S. 112 [1988]; *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 [1986]; *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 [1985]; *City of Oklahoma City v. Tuttle*, 471 U.S. 808 [1985]; *Chardon v. Soto*, 462 U.S. 650 [1983]; *Smith v. Wade*, 461 U.S. 30 [1983].)<sup>16</sup>

<sup>16</sup> As for the argument that the proceedings in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) leading up to this Court's decision had not involved a jury (National League of Cities 24), it bears note that on remand, the constitutional taking case was tried to a jury. At the end of Mrs. Dolan's evidentiary presentation, the city agreed to settle with a combination of compensation and development entitlement. (*Dolan v. City of Tigard*, case no. C 94-1259 CV [Ore. Cir. Ct., Washington County].)

Every Circuit that has considered the issue has concluded that juries may determine municipal liability in a wide variety of § 1983 cases (some have held that they must).<sup>17</sup> Significantly, many of the cases consist of reversals of directed defense verdicts on the ground that the liability decision was for the jury.

Neither the City nor any of its *amici* have been able to point to a single case decided in §1983's 127-year history that denied a plaintiff the right to a jury trial except the one aberrational Eleventh Circuit decision in *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (11th Cir. 1996).<sup>18</sup> As the lone exception to an otherwise unbroken phalanx of Circuit Court decisions, *New Port Largo* warrants no more than disapproval. The variety of issues litigated in § 1983 suits is as great as the capacity of municipal employees to violate the constitutional rights of citizens. As the City concedes, the intent of the statute was "to provide remedies as broad as the protections afforded by the constitution." (City 21.) That breadth of coverage is in harmony with this

<sup>17</sup> The First, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits have held that parties to § 1983 actions are entitled to jury trials under either the statute itself or the Seventh Amendment. (*Perez-Serrano v. DeLeon-Velez*, 868 F.2d 30, 32 [1st Cir. 1989]; *Patzig v. O'Neil*, 577 F.2d 841, 848 [3d Cir. 1978]; *Burt v. Abel*, 585 F.2d 613, 616, fn. 7 [4th Cir. 1978]; *Anderson v. Nosser*, 456 F.2d 835, 841 [5th Cir. 1972], *cert. denied*, 409 U.S. 848; *Amburgey v. Cassady*, 507 F.2d 728, 730 [6th Cir. 1974]; *Drone v. Nutto*, 565 F.2d 543, 544 [8th Cir. 1977]; *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422, 1427 [9th Cir. 1996]; *Dolance v. Flynn*, 628 F.2d 1280, 1282 [10th Cir. 1980].) The Second, Seventh and Eleventh Circuits routinely submit such cases to juries. (E.g., *Moore v. Comesanas*, 32 F.3d 670, 673 [2d Cir. 1994]; *Lewis v. O'Grady*, 853 F.2d 1366, 1368 [7th Cir. 1988]; *Richardson v. Leeds Police Dept.*, 71 F.3d 801, 806 [11th Cir. 1995].)

<sup>18</sup> In contrast to the opinion below, *New Port Largo* contains no analysis of the issue. It merely accepted the government's assertion (dealt with at pp. 24-27, *infra*) that inverse and direct condemnation cases are the same. They are not. *New Port Largo* got it wrong.



Court's view that § 1983 "provides a remedy 'against all forms of official violation of federally protected rights.' [Citing *Monell*.]" (*Golden State Transit*, 493 U.S. at 106; emphasis added.) And that breadth of remedial coverage encompasses the guarantee of trial by jury.

And yet the City and its *amici* ask this Court to arbitrarily carve out *one subject* of § 1983 litigation in which juries *must not* operate, namely, whether overreaching municipal regulatory action takes property through the subterfuge of "regulating" it into total disutility. And they do so on the self-stultifying ground that *if* the City had acted lawfully and condemned the property in the first place, *then* it would have been entitled to a different trier of fact to try a "liability" issue that wouldn't have existed (because a direct condemnation action concedes liability). The short answer is that it didn't, and therefore it wasn't.

The City's argument becomes disingenuous when it is remembered that one of the specific reasons for adopting § 1983 — indeed, the Fourteenth Amendment itself — was to provide a federal remedy against cities that took property without paying for it.

"Representative Bingham, for example, in discussing § 1 of the bill [which would become 42 U.S.C. § 1983], explained that he had drafted § 1 of the Fourteenth Amendment with the case of *Baron v. Mayor of Baltimore*, 7 Pet 243, 8 L Ed 672 (1833), especially in mind. 'In [that] case *the city had taken private property for public use, without compensation . . .*, and there was no redress for the wrong . . . .' Bingham's further remarks clearly indicate his view that *such takings by cities*, as had occurred in *Barron*, would be redressable under § 1 of the bill. More generally . . . , § 1 of the bill would logically be the vehicle by which Congress provided *redress for takings*, since that section provided the only civil remedy for Fourteenth Amendment violations and that Amendment

unequivocally *prohibited uncompensated takings*. Given this purpose, it beggars reason to suppose that Congress would have exempted municipalities from suit, insisting instead that *compensation for a taking* come from an officer in his individual capacity rather than *from the government unit that had the benefit of the property taken*." (*Monell*, 436 U.S. at 686-687; emphasis added.)

Similarly, it "beggars reason" to believe that the problem of uncompensated takings by cities, although one of the explicit bases for both the Fourteenth Amendment and § 1983, would be the *only* type of constitutional violation that would be insulated from jury review — or, indeed, *any* judicial review under the City's overreaching theory.

The City's attempt to differentiate the protection afforded by § 1983 on the basis of the right invaded was rejected a quarter-century ago:

"[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other." (*Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 [1972].)

#### B. Both § 1983 and the Seventh Amendment Entitled *Del Monte* to a Jury Trial

In determining whether a party has the right to a jury, the issue is first examined under the statute. (*Lorillard v. Pons*, 434 U.S. 575, 577 [1978].) Here, both the statute and the Seventh Amendment call for a jury trial.

## 1. Section 1983 Mandates a Jury Trial in Actions For Damages

Section 1983 gives the injured party a broad range of remedies, by making the violator liable "... in an action at law, suit in equity, or other proper proceeding for redress." The choice of remedies is the plaintiff's; the complaint determines the kind of action. (*Bell v. Hood*, 327 U.S. 678, 681 [1946].) Here, Del Monte filed an action at law, seeking compensation for the damage inflicted by the City's unconstitutional actions. The right to a trial by jury follows.

"[W]here an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law." (*Pernell v. Southall Realty*, 416 U.S. 363, 370 [1974]; see *Feltner v. Columbia Pictures Tel.*, 140 L.Ed.2d 438, 448 [1998] ["We have recognized the 'general rule' that monetary relief is legal."]) Where Congress statutorily creates an action and provides a remedy traditionally enforced at law, then the trial is by jury. (*Pernell*, 416 U.S. at 375; *Curtis v. Loether*, 415 U.S. 189, 195 [1974].) When words are used that have a well-known meaning, Congress is presumed to have used the words in that sense. (*Standard Oil Co. v. United States*, 221 U.S. 1, 59 [1911].) The words "action at law" have always had a clearly understood meaning that involves the right to a jury trial. (See *Lorillard*, 434 U.S. at 583.) A Congressional authorization of an "action at law" authorizes a jury trial. By using a legal term of art like "action at law," Congress allowed this Court to infer a jury trial. (434 U.S. at 583.) Compare *Feltner*, 140 L.Ed.2d at 448, where, lacking any such terms of art in another statute, this Court was not able to infer the statutory right to a jury trial.

## 2. The Seventh Amendment Mandates a Jury Trial in Actions at Law

In determining whether the Seventh Amendment guarantees a right to a jury in a statutory cause of action, this Court uses a two-part test: first, compare the statutory action to actions in 18th-century England, and second, determine whether the remedy is legal or equitable. (*Tull v. United States*, 481 U.S. 412, 417-418 [1987]; *Granfinanciera v. Nordberg*, 492 U.S. 33, 42 [1989]; see *Markman* 517 U.S. at 376.)

The remedy sought trumps the precise analog to old English forms of action. (*Tull*, 481 U.S. at 421; *Granfinanciera*, 492 U.S. at 42; *Curtis*, 415 U.S. at 196; *Chauffeurs*, 494 U.S. at 565; *Wooddell v. Electrical Workers*, 502 U.S. 93, 97 [1991].)

"Whether or not a close equivalent to [the statute] existed in England in 1791 is irrelevant for Seventh Amendment purposes, for that Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty." (*Pernell*, 416 U.S. at 375, emphasis added; see also *Curtis*, 415 U.S. at 193; *Tull*, 481 U.S. at 420; *Granfinanciera*, 492 U.S. at 42.)

The Seventh Amendment's reference to jury trials in "suits at common law" extended "beyond the common law forms of action recognized at that time." (*Curtis*, 415 U.S. at 193.) The phrase "suits at common law" was intended to do no more than to distinguish suits traditionally tried to juries from those tried in admiralty or equity. (*Parsons v. Bedford*, 3 Pet. 433, 446 [1830].) The Seventh Amendment right to a jury trial applies to "all but" those cases involving solely equitable remedies. (*Granfinanciera*, 492 U.S. at 43-44; see *Chauffeurs*, 494 U.S. at 564.) When "legal" issues are presented, a jury is mandated upon request. (*Dairy Queen v. Wood*, 369 U.S. 469, 472-473 [1962].)



Applying this Court's two-factor test to this case, it is clear that this case is an action at law, and the closest common law analogs would have been tried to juries.

**a. The Closest Common Law Analogs to This Case Are Tort Cases Tried to Juries, Not Equitable Actions Seeking Specific Relief**

When seeking analogs to common law causes of action, one must focus on cases involving wrongful, rather than lawful, acts. Here, the City took property without paying for it. That is not proper conduct and should not be treated as if it were municipal business as usual.<sup>19</sup> Thus, for example, when this Court analyzed *Monroe v. Pape*, it viewed police actions as illegal, rather than proper. ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . . ." [365 U.S. at 184; quoting with approval.])

The City and its *amici* simply ignore that fundamental concept. Their simplistic, and legally erroneous, conclusion is that this is an "inverse condemnation" case. Hence, goes the argument, it is like direct "condemnation" because both spring from the substantive provisions of the Fifth Amendment and both labels contain the word "condemnation." The City's approach boils down to this syllogism:

- condemnation cases don't require juries (*Bauman v. Ross*, 167 U.S. 548 [1897]; *Reynolds*, 397 U.S. 14);

<sup>19</sup> The City and its *amici* appear to disagree (City 25), but their words betray the true situation. As the brief of 87 cities and counties puts it, "... the taking is not considered a wrong or an injury *as long as the government pays compensation*." (Brief of San Francisco *et al.* 13; emphasis added.) The truth is in the italics: here, the City did *not* pay and still resists paying. *That* makes its actions concededly wrongful.

- an inverse condemnation case is like a condemnation case;
- therefore, inverse condemnation cases don't require juries.

The syllogism is fallacious. For multiple reasons.<sup>20</sup>

First, § 1983 comes into play here *not* because the City is condemning the subject property, but because the City *refused* to condemn it, but took it anyway. This is no more an "inverse condemnation" case than *Owen v. City of Independence*, 445 U.S. 622 was a civil service personnel action, or a "wrongful termination" case. Prosecution under § 1983 determines the character of the litigation. See, e.g., *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977) which dealt with a mother's right to custody of her children. *Lawful* proceedings to terminate parental rights are universally held in non-jury, family court, settings. Yet when done wrongfully, and the matter is brought to court via § 1983, the issue becomes one of constitutional tort for the jury, not a

<sup>20</sup> The argument in the text assumes *arguendo* that juries are not constitutionally required in federal direct condemnation cases, as that issue is beyond those presented here for review. When the occasion presents itself, however, there are good reasons to reconsider the accepted bromide that juries are not required. Key among them is an apparent misconception about English practice in the 18th century. From 1708 through 1798, condemnation cases — including both valuation and any other challenges to the taking — were tried to juries on demand. (*deKeyser's Royal Hotel v. The King*, 2 Ch. 222 [1919].) Indeed, "[u]ntil 1854, trial by jury was the only form of trial used in any court of common law." (Sir Patrick Devlin, *Trial By Jury* 130 [Stevens & Sons. Ltd. 1956].) A fuller explication may be found in the *amicus* brief of Pacific Legal Foundation herein, and an exhaustive analysis of both English and early American practices is in Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U.L. Rev. 144 (1996). Nor does this analysis affect takings cases against the United States, as those cases are bound up with the concept of waiver of sovereign immunity (see *McElrath v. United States*, 102 U.S. 426 440 [1880]), something not involved here.

proper family court matter. "These causes of action . . . exist independent of any other legal or administrative relief that may be available as a matter of federal or state law." (*Felder*, 487 U.S. at 148; quoting with approval.)

Second, even if one were to assume this case to be an inverse condemnation case rather than a constitutional tort case, inverse condemnation and direct condemnation are not the same. This Court spoke to this point in *United States v. Clarke*, 445 U.S. 253 (1980). There, the Court had to decide whether a statute authorizing a state to "condemn" land allotted to native Americans also authorized the "inverse," i.e., the seizure of such land by a state, forcing the owner to recover compensation through an inverse condemnation action. This Court made it clear that inverse condemnation is not direct condemnation.

"There are important legal and practical differences between an inverse condemnation suit and a condemnation proceeding . . . . [and there is a] well-established distinction between condemnation actions and physical takings by governmental bodies that may entitle a landowner to sue for compensation." (445 U.S. at 255-256.)

"[T]here are sufficient legal and practical differences between 'condemnation' and 'inverse condemnation' to convince us that when § 357 authorizes the condemnation of lands . . . , the term 'condemned' refers not to an action by a landowner to recover compensation for a taking, but to a formal condemnation proceeding instituted by the condemning authority." (445 U.S. at 258.)<sup>21</sup>

<sup>21</sup> Thus, when the *amicus* brief of the 87 California cities and counties asserts that "[i]nverse condemnation differs from direct condemnation . . . only insofar as the action is initiated by the property owner" (p. 6; emphasis added), it argues from a flawed premise. The Court also receives little assistance from the brief filed by 29 states and Guam which, in direct contradiction of this Court's

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Some of those "differences" were noted in *Clarke*. First, condemnation law requires the government to observe many procedural safeguards; a seizure of property fails to fit that mold.<sup>22</sup> As this Court put it with understatement, "[s]uch a taking thus shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation." (445 U.S. at 257.)<sup>23</sup> That shift is important — indeed, sometimes it is critical.<sup>24</sup> It can put the property owner at a "significant disadvantage." (445 U.S. at 258.) While the only issue in virtually all *direct* condemnation cases is the amount of compensation,<sup>25</sup> an *inverse*

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(fn. continued)  
analysis in *Clarke*, asserts that "[w]ith respect to proofs and issues, state inverse condemnation cases are *generally the same* as traditional eminent domain proceedings." (p. 8; emphasis added.) Both *Clarke* and litigational reality show that they are nothing of the sort.

<sup>22</sup> At a minimum, there are the procedures in Rule 71A, Fed. R. Civ. P., and its state equivalents. There are also the rules adopted by Congress to ensure fair treatment of property owners when government acquires their property (42 U.S.C. § 4651) which have been adopted in all of the states as well (e.g., Cal. Govt. Code § 7267 *et seq.*) and "govern, to some extent" the manner in which government acquires title to property. (*Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 5-6 [1984].) Obviously, in a case like this, the government evades these statutory duties and safeguards and commits a constitutional wrong that is subject to redress under § 1983. (See *Lake Country Estates*, 440 U.S. 391.)

<sup>23</sup> Earlier, this Court described the shift as "putting on the owner the onus of determining" the fact, nature and timing of the taking. (*United States v. Dickinson*, 331 U.S. 745, 748 [1947].) Whether "onus" or "burden," it's oppressive, and falls leagues short of the governmental concession of liability that is axiomatic in a direct condemnation action.

<sup>24</sup> See *Agins v. City of Tiburon*, 447 U.S. 255, 258, fn. 2 (1980), noting that this is the principal distinguishing feature between direct and inverse condemnation.

<sup>25</sup> In rare cases, property owners challenge the government's right to condemn. These challenges are rarely successful. (See, e.g., *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 [1984].) And they

(continued)



condemnation plaintiff cannot address that issue until the trier of fact first concludes that an uncompensated taking has occurred.<sup>26</sup> In this context, that difference is crucial.

Congress agrees. For example, attorney's fees are not recoverable in direct condemnation actions under Rule 71A, but they are authorized in successful inverse condemnation cases (42 U.S.C. § 4654), because the government forced onto the property owner the extra burden and expense of proving liability. (*Pete v. United States*, 569 F.2d 565, 568 [Ct. Cl. 1978].) When the government forces a landowner to sue, it violates not only the Constitution, but also statutory provisions. It cannot very well demand that its wrongdoing be rewarded by the courts treating it as if its acts were lawful when, in fact, they give rise to a constitutional tort that encompasses all compensable harms, of which the uncompensated taking is but one.<sup>27</sup>

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(fn. continued)

don't deal with liability for the taking (contrary to the assertion of the League of Cities' brief, pp. 11-12), but with the government's right to proceed with the acquisition. That's not a question of liability, but of power and jurisdiction. Liability (i.e., the obligation to pay) is conceded in a condemnation action.

<sup>26</sup> Here is another false premise of the 87 California cities and counties. Their brief says "[i]t would be incongruous to require liability issues in direct condemnation to be tried by a judge, and simultaneously allow liability for inverse condemnation to be tried to a jury." (p. 14.) But by filing a direct condemnation complaint, the government admits "liability" to pay for the property it is taking. Such complaints typically pray that compensation be awarded to the property owner and title be transferred to the condemnor. An exemplar of the prayer in such a complaint appears at 7 Nichols on *Eminent Domain* § 2.11[2], p. 2-49 (3d ed. 1998). For a California form with which the 87 cities and counties ought to be familiar, see 1 *Condemnation Practice in California* § 8.2 at 310 (Cal. Cont. Ed. Bar, 2d ed. 1998).

<sup>27</sup> Thus, in a § 1983 action for an unlawful taking of private property, compensation is awarded not only for the taking but for other tortious harms inflicted in the process. (*McCulloch v. Glasgow*, 620 F.2d 47 [5th Cir. 1980].)

The short of it is this: if the City wanted the benefits of direct condemnation procedure, then it should have condemned this property in the state courts (see Cal. Govt. Code § 7267.6), rather than making Del Monte and Ponderosa Homes jump through bureaucratic hoops, going through five different plans in five years, and then tell them that no use could be made of this land. The City was statutorily obligated to initiate a condemnation action. It didn't. It is *not* here as some sort of virtual condemnation plaintiff, but as a constitutional tortfeasor/defendant. The City put its liability in issue by its deliberate conduct. It is in no position to complain because this issue was resolved by a jury — the same as in all other "constitutional tort" cases.

If there is a common law analog to unlawfully taking property without payment, it would be trespass or conversion, as the Court of Appeals held below. (95 F.3d at 1427.) The facts show a deliberate, persistent municipal course of conduct to deny Del Monte all economically productive use, and force the transfer of its land to governmental ownership. The City's plan succeeded.<sup>28</sup> Additionally, as an action whose gravamen is that the City has taken property without

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<sup>28</sup> The property is now owned by the State of California. After the City got done with it, there was no private use for the property and no market for it, except a conveyance to the State at a fraction of its fair market value. Presumably, the property will become part of the adjacent State beach.

One must be careful in predicting governmental action, however. This Court may remember, for example, that in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), South Carolina argued strenuously that Mr. Lucas must leave his property vacant to protect various public interests. After this Court remanded the case to the South Carolina courts, the government settled the case and bought the property. Did it remain vacant? No. The government sold it to another private individual for development so it could recoup its purchase price. (See Kanner, *Not with a Bang, but a Giggle: The Settlement of the Lucas Case*, in *Takings: Land-Development Conditions and Regulatory Takings after Dolan and Lucas*, ch. 15 [Callies, ed., ABA Press 1996].)

paying for it, the action is analogous to actions to recover land. Nearly a quarter-century ago, this Court noted that it had "long assumed that actions to recover land . . . are actions at law triable to a jury." (*Pernell v. Southall Realty*, 416 U.S. 363, 370 [1974].) After a thorough review, that assumption was confirmed. (416 U.S. at 376.) Here, the jury found (and the trial judge and appellate panel confirmed) that, by regulating it into total disutility, the City had temporarily taken Del Monte's property as surely as if it had seized it and built a fence around it. As Professor Tribe put it, ". . . forcing someone to stop doing things with his property — telling him 'you can keep it, but you can't use it' — is at times indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else." (Tribe, *American Constitutional Law* § 9-3 at 593 [2d ed. 1988].)

Moreover, the determination of liability is "essential to preserve the right to a jury's resolution of the ultimate dispute." (*Markman*, 517 U.S. at 377.) Liability is the *sine qua non* of this dispute. If a jury is not permitted to determine whether the City's actions took property in violation of the Fifth Amendment's guarantee, then it has effectively been removed from the core of the case. Liability *is* the case. That's the key difference between direct and inverse condemnation.

In short, it is the *violation*, not the nature of the violated right or of the constitutional provision, that is the essence of the § 1983 action. And where the violation is subject to redress by a monetary award, it is an action at law, historically triable to a jury.

**b. The Remedy Sought Here is Compensation, a Traditional Legal Remedy Granted by Juries**

Although it seems clear that the closest common law analogs to this case would have been tried to juries, there is, as this Court put it, no need to "rest our conclusion on . . . an

'abstruse historical' search for the nearest 18th-century analog. . . . [C]haracterizing the relief sought is '[m]ore important' than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial." (*Tull*, 481 U.S. at 421; citations omitted.) The test is the nature of the remedy, whether equitable or legal.<sup>29</sup> And the general rule is clear: ". . . where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law." (*Pernell*, 416 U.S. at 370; see *Feltner*, 140 L.Ed.2d at 448 ["We have recognized the 'general rule' that monetary relief is legal."]) Where Congress statutorily creates an action and provides a remedy traditionally enforced at law, then the trial is by jury. (*Pernell*, 416 U.S. at 375; *Curtis*, 415 U.S. at 195.)<sup>30</sup>

*Chauffeurs*, 494 U.S. at 570-571, describes two factors that could, on rare occasion, make payment of money an equitable, rather than a legal, remedy: restitution or an award that is incidental to or intertwined with injunctive relief. In *Chauffeurs*, the damages consisted of back pay and benefits. That was not restitution. (494 U.S. at 571.) Here, the damages consist of compensation for a temporary taking.

<sup>29</sup> In *Chauffeurs*, for example, the Court concluded that a union's breach of the duty of fair representation more closely resembled an equitable action for breach of trust than a legal action for attorney malpractice, although both were close. Nonetheless, because the remedy sought was purely legal (monetary recovery), a jury was required. (494 U.S. at 566-570.)

<sup>30</sup> The National League of Cities urges (p. 16) that the appropriate remedial analog is injunction, because the purpose of an inverse condemnation action is to compel the government either to condemn the property or rescind the regulation. Wrong. The purpose is to obtain compensation for property *that has already been taken*, as this Court held in *First English*. (482 U.S. at 315.) As for compelling the government to condemn, *First English* is directly to the contrary, denying the courts the power to compel such action (482 U.S. at 321), which is legislative in nature (*Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 709 [1923]).



That's not restitution either. Injunctive relief wasn't present in *Chauffeurs*, and it isn't present here. This case presents no reason to depart from well-settled law that views a monetary recovery as one at law — traditionally a province of juries.

Noting that the statute authorizes relief via "an action at law, a suit in equity or other proper proceeding," the City ignores Del Monte's complaint seeking the legal remedy of damages, and presses the *non sequitur* that the statute somehow allows a jury only in "appropriate cases," of which, assertedly, this is not one. (City 20.)<sup>31</sup> Aside from ignoring the plain text of the statute which provides for a broad range of remedies *at the victim's election*, this argument ignores basic doctrine under which the plaintiff "is master to decide what law he will rely upon" and, consequently, what kind of case he or she will file. (*Bell*, 327 U.S. at 681.) See also *Tull*, 481 U.S. at 425, in which this Court told the United States that if it wanted equitable procedures, it should have filed a pleading seeking equitable relief. No reason appears why the City should get to occupy a litigational position more favorable than the federal government.

The short answer to these arguments is contained in *Lorillard*, where this Court analyzed a statute authorizing the trial court to grant "legal or equitable relief . . ." (29 U.S.C. § 626[c].) Because that plaintiff *sought* legal relief, and because Congress had to have known the import of the language it chose, this Court held that the plaintiff was entitled to a jury trial. The same is true here.

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<sup>31</sup> Two of the City's *amici* carry the argument to an extreme, if not a *reductio ad absurdum*, in suggesting that cases involving property rights must be automatically transformed into "other proper proceedings" (which they insist are proceedings not permitting juries at all) no matter what the facts, or how the plaintiff pleads the case. (Municipal Art Society 5, fn. 2; National League of Cities, *et al.*, 7.) No legal or historical basis is provided for this extremist argument.

### C. The Issues in This Case Are Appropriate For Jury Determination

The jury in this case was carefully instructed (JA 300-305) to apply this Court's *Agins* takings formula:

"The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." (447 U.S. at 260; citations omitted.)

These two issues are the kind juries have considered in § 1983 cases for generations. As briefed above (p. 15, *supra*), § 1983 juries have examined city budget policy, city and county law enforcement policy, county road acquisition policy, municipal employment policy, city medical care policy, school district sexual abuse policy, and the conflict between a police department's chain-of-command policy and a township's sexual harassment policy, among others.

There is nothing about the *Agins* issues that is more complex or arcane than any of those. (See *County of Allegheny*, 360 U.S. at 192.) Quite the contrary. As this Court has repeatedly said, the determination of whether regulatory action effects a taking of private property is the kind of decision that juries routinely make — an "essentially ad hoc, factual" one. (*Lucas*, 505 U.S. at 1015; *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 [1978].) This Court lays down the guiding policy factors (438 U.S. at 124), the trial court instructs the jury on the standards to apply,<sup>32</sup> and then it is for the jury to decide whether specific

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<sup>32</sup> The City's claim that seemingly direct factual issues are confused by judicial gloss (thus rendering the factual issues unfit for juries) overlooks that the function of jury instructions is to explain that gloss to the jury so it can proceed accordingly. That is done in every jury trial, and that's what happened below. (See JA 300-305.) The jury was given every instruction the City sought. (Compare *Smith*, 461 U.S. at 50-51.)

municipal acts adhere to or violate the standards.

The first of the two *Agins* inquiries is whether the regulation substantially advances a legitimate state interest. The jury was instructed to find that the City passed this test if there was a reasonable relationship between the City's action and a legitimate public purpose. (JA 304.)<sup>33</sup> "Reasonable relationships" are the meat and potatoes of juries; they examine and decide them in ordinary tort actions every day. It is also the kind of issue § 1983 juries routinely decide. For example, in *Hemphill v. Kincheloe*, 987 F.2d 589, 593 (9th Cir. 1993), the court held that whether prisoner searches are reasonably related to legitimate penological goals was a question for the jury. So, too, in *Parks v. Watson*, 716 F.2d 646, 654, fn. 1 (9th Cir. 1983), a land use case, it was a question for the jury whether the city's policy requiring dedication of geothermal wells was a reasonable precondition to a municipal street vacation.

Here, the jury heard extensive evidence about the City's actions and the reasons offered for them. The jury also knew the entire history of the owners' efforts to build on this property, including each of the five proposals first encouraged and then rejected by the City.

The same is true of the second *Agins* prong, i.e., whether the City's actions denied Del Monte economically viable use of its land. All that was needed to evaluate that issue was a pair of ears and common sense. Diminution and destruction of value are routinely tried to juries in private commercial disputes and direct condemnation cases. The testimony clearly established that, even to consider a 190-unit development on this 37.6 acre parcel (which the City had theoretically zoned for more than 1,000 units), the City demanded a

<sup>33</sup> The jury was further instructed at the City's request that "legitimate public interest can include protecting the environment, preserving open space agriculture, protecting the health and safety of its citizens, and regulating the quality of the community by looking at development." (JA 304.)

large public beach, a buffer to protect the adjacent State beach, and a dune "viewshed" so that drivers on Highway 1 wouldn't be able to see that there were homes on this property. When the City thereafter said that what was left of the property would have to be left completely undeveloped (but cleaned up and restored to a state of nature) as a preserve for unseen butterflies, the last nail was placed in the coffin of any possible private use for this land.<sup>34</sup> That's not rocket science. And it is elitist arrogance for the City and its friends to suggest that juries are unable to evaluate such evidence.

## II.

### THE REASONABLENESS AND LEGITIMACY OF GOVERNMENT REGULATIONS HAVE ALWAYS BEEN SUBJECT TO JUDICIAL REVIEW FOR UNCONSTITUTIONALITY

The City and its *amici* have laid bare their fondest fantasy: to regulate land use free from the constraints of the Constitution, and thereafter to be immune from any judicial review, which they see as "second-guessing" them.<sup>35</sup> The

<sup>34</sup> It is insufferable on this record for the City to assert repeatedly that the property is *still* zoned for intensive residential use if only someone would apply for it. (City 9-10, 18.) In fact, the property is now owned by the State. Moreover, the one thing that the five administrative proceedings made clear is that the "existing zoning" is a sham, and uses permitted by it theoretically will not be permitted in fact. One of the key purposes of § 1983 is "to provide a federal remedy where the state remedy, although adequate in theory, was not available in practice." (*Monroe*, 365 U.S. at 174.) Plainly, this zoning is (at most) only "adequate in theory." Experience showed that it was worthless in practice.

<sup>35</sup> Their position brings to mind the comments of a prominent land use professor following his return from China in the days when it was even more in the grip of a totalitarian regime: "*China is a planners' paradise*. There is no gap between plan making and plan implementation. Nor is there any private developer to lure or browbeat into conformance. *Once a plan is made, it is the law of the*



position would be beneath comment were it not presented by so many coordinated voices in solemn proceedings of this Court. But this orchestrated chorus is nothing less than an attack on the bedrock judicial prerogative of reviewing governmental action for constitutionality. It is not substantiated anywhere in this country's traditions or in the law — nor should it be.<sup>36</sup>

Is there a place for judicial deference to local government? Certainly. For example, when cities condemn land, their determinations of public use and necessity are entitled to deference. (*Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241-242 [1984].)<sup>37</sup> When legislating broadly, their determinations are entitled to deference (*City of Euclid v. Ambler Realty Co.*, 272 U.S. 365 [1926]), but specific applications of the zoning power have always been subject to judicial review (*Nectow v. City of Cambridge*, 277 U.S. 183 [1928]).

In short, there are limits to deference. "The greatest weight is given to the judgment of the legislature, *but it always is open* to interested parties to contend that the legislature has gone beyond its constitutional power."

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(fn. continued)

land, and as all significant development is public, *what the government plans, it simply does.*" (Callies, *Land Use Controls: Of Enterprise Zones, Takings, Plans and Growth Controls*, 14 Urban Lawyer 781, 845 [1982]; emphasis added.) That's how it goes *without* constitutional protection.

<sup>36</sup> "The genius of our democracy springs from the bedrock foundation on which rests the proposition that office is held by no one whose orders, commands or directives are not subject to review." (*Winger v. Aires*, 89 A.2d 521, 522 [Pa. 1952].)

<sup>37</sup> However, those City *amici* who insist on using direct condemnation cases to rationalize deference in regulatory takings (e.g., APA, p. 11) are wide of the mark. In direct condemnation cases the taking is conceded, and the landowner's rights are observed when just compensation is awarded. (*Berman v. Parker*, 348 U.S. 26, 36 [1954].) Here, the taking was denied, and compensation was vigorously contested (nothing has yet been paid).

(*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 [1922]; emphasis added.)

The City's problem is that it refuses to recognize such limits; it demands unreviewable deference to its individualized acts that regulate particular parcels of property into total disutility. That is the situation at bench. Each time Del Monte went to the City with a proposal, the City demanded more but said it would approve less. By the time of the *fifth* plan denial, the City demanded everything and approved nothing. With respect, that wasn't planning; that was an unabashed municipal grab that went beyond the mere "extortion" criticized by this Court in *Nollan*. (483 U.S. at 837.)<sup>38</sup> In reviewing land use regulations, this Court has repeatedly made clear that land use planners and regulators are not an aristocracy.<sup>39</sup> They *are* subject to constitutional limitations, and their acts *are* subject to judicial review.<sup>40</sup>

In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Court ended years of debate and confusion in the lower courts when it reaffirmed that the remedy for a regulatory taking was just compensation. The defendant county and its many *amici* had

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<sup>38</sup> Dissenting from a recent California Supreme Court decision, Justice Janice Rogers Brown aptly captured the municipal conduct present here as well: "When the answer to every question about what the public needs or wants or should have is always 'more,' the demand for free public goods is infinite. Against this relentless siphon, the takings clause, and the courts' ardent defense of it, stands as a last lonely bulwark of property rights." (*Landgate v. California Coastal Commn.*, 17 Cal.4th 1006, 1043, 953 P.2d 1188 [1998] [Brown, J., dissenting], *pet. for cert. anticipated*.)

<sup>39</sup> As Justice Brennan aptly put it: "After all, if a policeman must know the Constitution, then why not a planner?" (*San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 [1981] [Brennan, J., dissenting on behalf of four Justices].)

<sup>40</sup> See Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 Rutgers L. Rev. 15, 99 [1983].)

voiced fears that any rule requiring adherence to the Just Compensation Clause in the regulatory context would cripple municipalities' ability to govern.<sup>41</sup> This Court's rejection of those hyperbolic pleas was clear and instructive:

"We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them.<sup>[42]</sup> As Justice Holmes aptly noted more than 50 years ago, 'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.' [Citation.]" (482 U.S. at 321.)

Perhaps underlying that conclusion was this Court's repeated recognition that, when the governmental interest is financial (as in obtaining open space use of Del Monte's property for free or a fraction of its worth), its actions must be viewed warily. (See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 [1977] ["... complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A

<sup>41</sup> This jeremiad, which has become standard governmental fare any time anyone suggests that courts exercise constitutional control over their regulatory actions, is repeated at bench. (See APA 5, 21; U.S. 15; 87 Cities and Counties 4, 24.) It wasn't valid in the past. It still isn't.

<sup>42</sup> Thus, the Solicitor General's search for a "justification in Fifth Amendment jurisprudence for imposing such a limitation on the flexibility of local governments" (U.S. 15) finds its answer in *First English*.

governmental entity can always find a use for extra money ..."]; *United States v. Winstar Corp.*, 518 U.S. 839, 135 L.Ed.2d 964, 1005 [1996] ["... statutes tainted by a governmental object of self-relief ... in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties."]; *United States v. Good Real Property*, 510 U.S. 43, 55-56 [1993] [careful examination "is of particular importance ... where the Government has a direct pecuniary interest in the outcome of the proceeding."].<sup>43</sup>

In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) the Court warned government regulators not to attempt to evade the Constitution's strictures through inventive wordplay: "We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." (483 U.S. at 841.) Particular care is needed when government conditions approval of a project on an actual conveyance of property "... since in that context there is heightened risk that the purpose is avoidance of the compensation requirement ... ." (483 U.S. at 841.)<sup>44</sup>

*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) is instructive. Viewing a statute that contained numerous "legislative findings" to support its conclusion (see 505 U.S. at 1021, fn. 10), this Court stressed that what is important is *not* the voiced legislative rationale (because that would always justify the governmental act unless the

<sup>43</sup> In this context, it seems appropriate to note that Professor James Buchanan received the Nobel Prize in Economics for demonstrating that, for all the familiar platitudes about public interest, government officials act in pursuit of their own self-interest, the same as private parties. (See Buchanan & Tullock, *The Calculus of Consent* [1962].)

<sup>44</sup> Make no mistake, with the beach, the dunes, the park buffer, and the butterfly preserve, this case involves greater demands for property "dedications" than either *Nollan* or *Dolan*; here, the exaction was of everything Del Monte owned.



legislature had "a stupid staff" drafting its findings [505 U.S. at 1025, fn. 12]), but whether the underlying facts support the legislative result.<sup>45</sup> Remanding the case to give the State an opportunity to defend the legislative handiwork, this Court "... emphasize[d] that to win its case, South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim . . . ." (505 U.S. at 1031; internal punctuation simplified.)<sup>46</sup> Adverting to the government's financial interest in the results of the regulation, the Court also noted that when — as appears both here and in *Lucas* — regulations "requir[e] land to be left substantially in its natural state [they] carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." (505 U.S. at 1019.)

Thus, after *Lucas*, this Court's standard for reviewing intrusive legislative/regulatory land use action is several leagues away from the extremely deferential template wished for by the City and its *amici*. Their theory's foundation is

<sup>45</sup> Recall that, in *Lucas*, the property owner conceded that the regulation was legitimate (120 L.Ed.2d at 808), but successfully argued that its impact was a taking nonetheless. In other words, taking for a "good" purpose is still a taking. Thus to say, as do the City and its *amici*, that government should be free of judicial review because of the environmental (or other) goodness of its purpose, is to utter a constitutional non sequitur. The purpose of the Fifth Amendment is "... to secure compensation in the event of otherwise proper interference amounting to a taking." (*First English*, 482 U.S. at 315; first emphasis, the Court's; second emphasis added.) After all, every condemnation is for a valid public use, but that only requires, not excuses, the payment of compensation. (*Mahon*, 260 U.S. at 415; *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1571 [Fed. Cir. 1994].)

<sup>46</sup> Contrary to what the American Planning Assn. may want to believe (APA, p. 11), this is hardly viewing regulations "with great deference."

hopelessly flawed because, under it, a court could never determine that a municipal regulation offends the Constitution. That determination would be the municipality's alone, which would thereby get to pass constitutional judgment on its own handiwork, raising serious due process concerns.

This Court applied its *Lucas* skepticism in *Dolan*, 512 U.S. 374, concluding that the city's findings failed to "show the required reasonable relationship" between the exaction demanded as a condition to a building permit request and the impact of the proposed development on the city. Far from deferring to the municipal say-so, the Court placed the burden on the city to justify its regulation, and to make a determination as to each property owner affected by a regulation that affected many properties. (512 U.S. at 391, fn. 8.) That is hardly consistent with the City's present demand that it should get to pass judgment on whether it has satisfied constitutional criteria lest it be "second-guessed" by the courts.

In light of the incessant argument by the City and its *amici* that the rules must be different for pure regulatory cases and physical exaction cases, it is noteworthy that the group of cases discussed above contains two of each. *First English* and *Lucas* were pure regulatory cases, while *Nollan* and *Dolan* involved exactions. This Court insisted that constitutional restraints and critical judicial analysis be applied in all of them alike. In fact, in *Lucas*, this Court remarked on "the practical equivalence in this setting of negative regulation and appropriation." (505 U.S. at 1019.) In other words, as Justice Brennan had noted years earlier, the impact of severe regulation is the same as physical invasion, and should be treated the same under the Constitution. (*San Diego Gas*, 450 U.S. at 652; dissenting, but expressing the substantive views of five Justices.) In *Yee v. City of Escondido*, 503 U.S. 519 (1992), this Court said the *Nollan* standard that, according to the City, applies only to exactions, applies in regulatory taking cases to determine "whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." (*Id.*

at 530.) Del Monte of course acknowledges that the burden of proof is different in the two classes of cases. The property owner bears the burden in the pure regulatory context (as Del Monte willingly shouldered below), while the government bears the burden in the physical context (as this Court held in *Dolan*). But exactions are involved here too, if that matters. In any event, no case holds that municipal regulatory actions are beyond judicial review. This Court long ago had the appropriate response:

"If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state governor, and not the Constitution of the United States, would be the supreme law of the land; [and] that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases . . . . Under our system of government, such a conclusion is obviously untenable. . . . When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression." (*Sterling v. Constantin*, 287 U.S. 378, 397-398 [1932].)

Against this background, it is impudent for the City to assert (as if it were invoking an existing rule in regulatory taking cases) that "courts employ deferential standards of review and require only that there be *some basis* to support the local government's decision." (City 39; emphasis added.) Thus, charges the City, "[t]he Ninth Circuit's decision fundamentally changes the traditionally deferential approach applied to local land use decisions." (City 39.) Wrong. There may be all the "basis" in the world for the City's action, but that neither justifies confiscation (*Lucas*,

505 U.S. at 1028-1029) nor prevents judicial review.<sup>47</sup> In fact, the Ninth Circuit provided exactly the kind of review this Court requires in *prima facie* cases of regulatory taking. As this Court put it in *Yee*, 503 U.S. at 522, a regulatory taking case "necessarily entails complex factual assessments of the purposes and economic effects of government actions." "Complex . . . assessments" are antithetical to the abject judicial surrender of Constitutional prerogatives sought by the City.

Under both *Lucas* and *Dolan* the proper standard for review subjects the governmental action to searching evaluation. That is why *Lucas* emphasized that the government must go beyond public interest platitudes or generalized assertions that the proposed private use is not compatible with the public interest. *Dolan* built on that by placing the burden on the government to justify the exaction of property in exchange for approval of a project. (505 U.S. at 1031.) But in any event, there must be compliance with the Constitution, and that decision is one for the judiciary — as has been the case ever since *Marbury v. Madison*, 1 Cr. 137 (1803).

<sup>47</sup> The City's argument is thus misfocussed. A takings claim always presumes that the government has a legitimate "basis" for its action; otherwise the governmental act is *ultra vires* and void. (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 [1952].) The only issue is obtaining compensation when that action takes private property. (E.g., *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1175 [Fed. Cir. 1994].)



III.

**"PROPORTIONALITY" IS A FINE STANDARD. IT WASN'T USED AT THE TRIAL IN THIS CASE, AND IT WAS MERELY DICTUM ON APPEAL, BUT "PROPORTIONALITY" PERMEATES AMERICAN LAW**

The City and some of its *amici* have become mesmerized by the concept of "proportionality," and see evil lurking there that exists only in their imaginations. Their arguments overlook these things: First, American law in general is based on proportionality. That's why we don't imprison jaywalkers. We let the punishment fit — or be proportional to — the offense.<sup>48</sup> Second, takings law in particular is permeated with proportionality. It wasn't something this Court had to invent for *Dolan*. Third, the concept wasn't placed before the jury anyway, and the Court of Appeals used it to shed light on the issue of reasonableness. To the extent it was more, it was dictum — and the dictum makes sense.

Taking the last item first, what the Court of Appeals said was "[e]ven if the City had a legitimate interest in denying Del Monte's development, its actions must be 'roughly proportional' to furthering that interest." (Pet. App. 16.) Simply put, if a homeowner installs a dining room lamp that violates a building code, she may properly be ordered to correct it — but we do not bulldoze her home to the ground. In like fashion, whatever harm may have been apprehended here by the City, it did not justify a ukase that the subject property be completely useless. Another court caught the essence of the issue: "In short, has the Government acted in a responsible way, limiting the constraints on property ownership to those necessary to achieve the public purpose, and

<sup>48</sup> See also *United States v. Bajakajian*, 118 S.Ct. 2028, 2031 (1998) ("... full forfeiture of respondent's currency would be grossly disproportional to the gravity of the offense.")

not allocating to some number of individuals, less than all, a burden that should be borne by all?" (*Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1571 [Fed. Cir. 1994].) Thus, when the City finally forbade all use of Del Monte's land for the sake of a butterfly preserve in an area where there were no butterflies, the jury was entitled to consider whether that was reasonable in the context of what the City said it was trying to accomplish. Plainly, it was not. That's why the City doesn't like the standard.

Beyond that, there's nothing strange or unique about examining proportionality in the context of takings cases. In this Court's most recent decision, *Eastern Enterprises v. Apfel*, \_\_ U.S. \_\_, 118 S.Ct. 2131 (1998), a four-Justice plurality concluded that Congress took Eastern's property by creating a "disproportionate" scheme to allocate the cost of health benefits in the coal industry. (118 S.Ct. at 2149.) "[T]he Constitution does not permit a solution to the problem of funding miners' benefits that imposes such a disproportionate and severely retroactive burden upon Eastern." (118 S.Ct. at 2153.) In earlier litigation similar to *Eastern*, this Court found no taking because the liability imposed was not "out of proportion." (*Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 [1993].)

In *Lucas*, this Court described the examination of the evidence to determine whether a regulatory taking had occurred as a "total taking" inquiry that would require:

"... analysis of, among other things, the *degree of harm* to public lands and resources or adjacent private property, posed by the claimant's proposed activities, the *social value* of the claimant's activities and their *suitability to the locality* in question, and the *relative ease* with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent landowners) alike." (505 U.S. at 1030-1031; citations omitted; emphasis added.)

That's a proportionality analysis. It is a comparison of the proposed development with surrounding land uses and an evaluation of such intangibles as "social value" and "suitability." If, after that analysis, the trier of fact concludes that the harm caused by the proposed development is disproportionate (i.e., its burden outweighs its utility), then the regulation stands and no taking will be found.

The traditional *Agins* test is a double exercise in proportionality. The trier of fact is asked to determine whether the governmental action "substantially advances" a "legitimate state interest" and, if it does, whether it nonetheless denies the property owners "economically viable" (or, as the Court would say in *Lucas*, "economically beneficial or productive") use of their land. If the balances are out of proportion, then the party with the short end of the stick loses. (See *Keystone*, 480 U.S. at 499, for an illustration of a proportionality analysis of economically viable use.)

When only a part of a larger holding is adversely affected by the challenged regulation, then additional proportionality analyses are required. The trier of fact must first determine what the appropriate "unit of property" is, and then analyze the regulation's impact on that "parcel as a whole." When the analysis is complete, the court will have determined whether the regulation's impact is proportional to the property owner's holdings and, hence, whether a taking has occurred. (See *Lucas*, 505 U.S. at 1016, fn. 7.)

The three-factor test of *Penn Central*, 438 U.S. 104, is also an exercise in proportionality. A key ingredient is whether the action being reviewed unjustly imposes a burden on the owners that should "be compensated by the government, rather than remain[ing] disproportionately concentrated on a few persons." (438 U.S. at 124.) That built on an earlier proportionality decision that the Fifth Amendment was "designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the populace as a whole" (*Armstrong v. United States*, 364 U.S. 40, 49 [1960]) — like imposing the

disproportionate burden on one property owner to provide a butterfly preserve for the entire community. (See also *Agins*, 447 U.S. at 260; *First English*, 482 U.S. at 318-319.)<sup>49</sup> In sum, whether by regulation or exaction, the City cannot curtail uses of private property so disproportionately that no economically productive uses are left to the owner.

#### IV. RESPONSE TO AN UNAUTHORIZED *AMICUS* *CURIAE* ISSUE: THERE IS NOTHING WRONG WITH THE *AGINS* FORMULA

The Solicitor General's *amicus* brief poses a question never addressed in this litigation: "Whether a land-use restriction that does not substantially advance a legitimate public purpose can be deemed, on that basis alone, to effect a taking of property requiring the payment of just compensation." (U.S., p. I.)

That "question" challenges the test established by this Court in *Agins*. But the City never challenged the *validity* of that test — at trial, on appeal, or in its Petition for Certiorari.

This Court has always read Rule 14.1(a), Rules of the Supreme Court of the United States, as strictly limiting the issues to those presented in the Petition for Certiorari. In *Yee*, 503 U.S. at 535-537, for example, this Court refused to consider arguments that a rent control ordinance was a *regulatory* taking because the question presented in the Petition inferentially limited itself to a *physical* taking. The Court agreed that the questions were "related" and "complementary" (503 U.S. at 537), but refused to consider them despite Petitioner's urging. More recently, in *Blessing v. Freestone*, 520 U.S. \_\_\_, 137 L.Ed.2d 569 (1997), a § 1983

<sup>49</sup> Even the City's brief recognizes that the core of takings law is to prevent regulatory burdens from being "disproportionately" placed on individual property owners. (City 25, 33.)



case challenging a state official's refusal to comply with federal AFDC requirements, this Court refused to consider two arguments raised by the Petitioner, even though they went to the heart of his liability. The first was whether to reconsider *Maine v. Thiboutot*, 448 U.S. 1 (1980) — just as the Court is now being asked to reconsider *Agins*. If that ploy had succeeded, § 1983 would no longer apply to statutory rights, and the Petitioner would have won. The second argument was whether the Eleventh Amendment precluded this suit against a state official. Again, success would have yielded victory for the Petitioner. This Court refused to consider either argument because they were neither raised nor decided below. (137 L.Ed.2d at 582, fn. 3; accord, *Suitum*, 137 L.Ed.2d at 990.) An *amicus* has even less standing than a party to inject extraneous issues. (E.g., *Knetsch v. United States*, 364 U.S. 361 [1960].)

Del Monte does not believe that question is properly here, and urges the Court to disregard it. Were it presented by any other entity, Del Monte would go no further and wait for the Court to order additional briefing on this additional issue, if it were desired. However, as the question has been posed by the Solicitor General, we will make a brief response on the merits, with the *caveat* that space limitations forbid analysis of an issue of this magnitude — the *Agins* test has been reiterated in eight decisions of this Court<sup>50</sup> — and scores of lower court opinions. It should not be decided on anything other than full briefing on a properly presented full record. (Compare *Yee*, 503 U.S. at 538; *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552, fn. 3 [1990].)

<sup>50</sup> *San Diego Gas*, 450 U.S. at 647 (Brennan, J., dissenting on behalf of four Justices); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan*, 483 U.S. at 834; *Pennell v. City of San Jose*, 485 U.S. 1, 18 (1988) (Scalia, J., concurring and dissenting); *Yee*, 503 U.S. at 534; *Lucas*, 505 U.S. at 1015-1016; *Dolan*, 512 U.S. at 385.

The strange governmental premise of this argument is that it is merely asking the Court to clear away a bothersome "dictum" that has never formed a holding of this Court. (U.S., pp. 9, 21.) That is a false premise.<sup>51</sup> In *Agins*, this Court laid down the rule for evaluating takings claims (447 U.S. at 260), and then it *applied* that rule *by holding* that the city had met the standard: "the zoning ordinances substantially advance legitimate governmental goals" (447 U.S. at 261). That was no dictum; it was a *ratio decidendi*. Thereafter, in *Nollan*, this Court again applied the standard and held that the California Coastal Commission had failed the test of advancing the public purpose, and therefore its regulation was invalid. (483 U.S. at 837.) In *Keystone*, this Court summarized the rule this way: "We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests . . . .' [Citing *Agins*.]" (480 U.S. at 485.) Thus, this Court has itself applied the "substantial advancement" rule, once to uphold a regulation and once to strike one down. It is not "mere" dictum. Undoing it would require disapproval of both *Agins* and *Nollan*.

At the heart of the substantive argument is the neo-*Lochnerian* idea that "failure to substantially advance a legitimate state interest" is "really" a substantive due process standard, rather than a takings standard. (See U.S., p. 29, fn. 16; League for Coastal Protection, *et al.*, p. 8.) But the *Agins* formulation fits with this Court's current views of the relationship of substantive due process to the enumerated protections in the Bill of Rights. In a nutshell, *Graham v. Connor*, 490 U.S. 386 (1989) holds that, where a claim can be brought under one of the separately stated guarantees in the Bill of Rights, there can be no claim for a violation of substantive

<sup>51</sup> Moreover, as shown in the *amicus* brief of the National Assn. of Home Builders (pp. 16-17, fn. 5), the Solicitor General has never questioned either the validity or precedential authority of this rule in any of the briefs he has filed here since *Agins*. On the contrary, the Solicitor General has consistently accepted and sought to apply that rule to the United States' advantage.

due process. The Ninth Circuit has held that rule directly applicable to takings claims, concluding after *en banc* consideration that no claim that is arguably a takings claim can be litigated as a substantive due process violation. (*Armendariz v. Penman*, 75 F.3d 1311 [9th Cir. 1994] [*en banc*].) That rule has been repeatedly applied in the Ninth Circuit, and this Court has declined opportunities to review it. (*Macri v. King County*, 110 F.3d 1496 [9th Cir. 1997], *cert. denied*, 118 S.Ct. 1178; *Sinclair Oil Co. v. County of Santa Barbara*, 96 F.3d 401 [9th Cir. 1996], *cert. denied*, 118 S.Ct. 1386.)

Thus it is the law, at least west of the Rockies, that property owners have no substantive due process claims, and *all* their claims are subsumed within the takings theory. As *Sinclair* summarized it, "in recent days we have expressly refuted the notion that substantive due process claims can apply where the government has allegedly effected a taking violative of the Fifth Amendment. In *Armendariz*, we explained that substantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments have merit. *Sinclair's* substantive due process claim, therefore, no longer states a valid cause of action." (96 F.3d at 407; internal punctuation simplified.)

Thus, the substantive due process argument proves too much: the reality is that all claims by property owners are now viewed judicially as takings claims and must be litigated that way. The first prong of the *Agins* test accurately states current law.

Apart from the absence of a substantive due process remedy for property owners, the Solicitor General also errs by refusing to acknowledge that this is a § 1983 case. That is the only explanation for the argument that government action that *fails* the substantial advancement test cannot be a taking, because all takings must serve legitimate public purposes. (U.S., pp. 26-27.) But a § 1983 action is brought

because of a "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . . ." (*Monroe*, 365 U.S. at 184; quoting with approval.) Here, the City had the power and the duty to acquire this land, but it *refused* to exercise the eminent domain power. Had it done its duty, it would have directly condemned Del Monte's property. Doing so would plainly have been for a public purpose and would have substantially advanced a legitimate state interest *and* it would have compensated Del Monte. When the City chose instead to subvert constitutional strictures, it established the basis for this statutory suit.

The *Agins* rule remains good law. There is no reason to tamper with it.

## CONCLUSION

The Ninth Circuit got this one right. Its judgment merits affirmance. This is one of the few regulatory taking cases that has managed to survive the ripeness gauntlet, go to trial on the merits, and result in compensation for a severely damaged property owner. An owner who goes through five different administrative proceedings, being strung along by an agency that never wanted this property developed to begin with, and is then turned down for reasons that preclude any private development, deserves compensation. If this Court nullifies the positive result of a judicial struggle dating back to 1986 (with administrative proceedings that began in 1981), the message will not be lost on other regulators. A decision in the City's favor will nullify all the good done by this Court's decisions in *First English*, *Nollan*, *Lucas*, *Dolan*, and *Suitum*. If this Court really meant what it said in *Dolan*, it will affirm:

"We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a



poor relation . . . ." (512 U.S. at \_\_\_, 129 L.Ed.2d  
at 321.)

DATED: July 30, 1998.

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SUPREME COURT, U.S.

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In The  
**Supreme Court of the United States**  
October Term, 1997

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CITY OF MONTEREY,

*Petitioner,*

v.

DEL MONTE DUNES AT MONTEREY, LTD. AND  
MONTEREY-DEL MONTE DUNES CORPORATION,

*Respondents.*

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On Writ Of Certiorari To  
The United States Court Of Appeals  
For The Ninth Circuit

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REPLY BRIEF FOR THE PETITIONER

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## I. INTRODUCTION

Respondents portray the City as presenting extreme and novel legal positions designed to insulate the City against liability for its supposedly outrageous abuses of power. For this purpose, Respondents distort the factual record concerning the City's land use decision and advocate new legal standards that would fundamentally change the role of the Constitution in the local land use process. Respondents advocate assigning to juries, rather than courts, the task of applying the perplexing standards governing regulatory takings. They seek to replace the historically deferential standard of constitutional review with a *de novo* reevaluation of the same evidence considered by the governmental decisionmaker. Finally, Respondents seek to impose takings liability for all governmental actions that a jury concludes did not achieve an appropriate equipoise between public and private interests.

While any one of these formulas alone would undermine the authority of local governments responsible for land use planning, cumulatively they promise to "throw one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts." *Eastern Enterprises v. Apfel*, 118 S.Ct. 2131, 2155 (1998) (Kennedy, J., concurring in part and dissenting in part). Respondents assert that this result is perfectly acceptable because, through the proposed standards, juries can inject "common sense into the balancing process." Resp. Br. at 14 n.13. The problem with Respondents' assertion is that juries are not city councils and they should not intrude on local governments' inherently political power to make and implement land use policies.

All this is *not* to say that local land use decisions and regulations are immune from constitutional review. Constitutional review is always available to ensure that there is some legitimate basis for the government's decision. This review is accomplished by applying to local land use decisions the same type of deferential review that courts apply to governmental decisions in other legislative, quasi-legislative and



quasi-adjudicative contexts.<sup>1</sup> Deference to the legitimate purpose of a land use decision does not make the Fifth Amendment a dead letter. There remains the Fifth Amendment requirement that just compensation be paid when a legitimate government action goes too far and deprives property of all economically viable use.

The ultimate issue posed by all three questions upon which *certiorari* was granted is how constitutional limitations on local land use decisions should be applied. Respondents would have a jury compare the benefits and burdens of a project, and impose liability if it concludes, as a matter of fact and policy, that project benefits outweigh project burdens, giving no deference to the local government's decision. Resp. Br. at 44. This approach is wrong. It would be tantamount to transforming the Constitution into a federal land use plan with juries acting as land use planners.

## II. RESPONDENTS MISCHARACTERIZE THE RECORD, THE CITY'S REGULATORY ACTION AND THE JURY'S VERDICT.

In their brief, Respondents essentially ignore the factual context of the City's decision to reject their development proposal. Respondents do not deny that inadequacies in their proposed habitat restoration plan were the primary ground for the City's decision and they make no mention of the fact that their restoration plan was seriously criticized by the United States Fish & Wildlife Service ("USFWS"), the California Department of Fish & Game ("Cal DFG") and others. Although they condemn the City's decision as an outrageous abuse of power, Respondents make no attempt to explain how

<sup>1</sup> The City supports the substantial arguments made by the United States and certain other amici that a finding that a regulation fails to advance a legitimate state interest cannot be a basis for imposing liability for "just compensation" under the Takings Clause. These arguments appear to be consistent with views recently expressed by members of this Court in *Eastern Enterprises*, 118 S.Ct. 2131, 2157-60, 2162-64 (1998) (Kennedy, J., concurring in part and dissenting in part; Breyer, J. dissenting).

their proposed plan was sufficient or why improvements to that plan were not feasible.

Proper review of the Ninth Circuit's decision in this case requires an accurate understanding of exactly what the City did and did not decide in rejecting the proposed 190-unit condominium development, and what the jury did and did not decide when it imposed takings liability.

Contrary to Respondents' fervid protests, the City's rejection of the 190-unit condominium proposal did not constitute a declaration that the subject property was to be preserved as open space or that all development on the subject property was precluded. Certainly, the trial court made no such finding. On the contrary, the trial court expressly concluded that the City did *not* intend to forestall all development on the subject property.<sup>2</sup> Pet. App. 41-42. Nor can it be said that the jury found that the City intended to preserve the property as open space. The jury imposed takings liability, but there is no indication of the basis for its verdict. There is no way of knowing whether the jury concluded that the City's action failed to advance a legitimate purpose or determined that the project denial deprived the property of all economically viable use. For this reason, Respondents are simply wrong insofar as they assert that it can be inferred from the jury's general verdict that that City's denial of the proposed 190-unit development constituted a denial of all use of the subject property.<sup>3</sup> Indeed, it was because the verdict form

<sup>2</sup> Respondents argue that, because the district court denied the City's post-trial motions for entry of judgment as a matter of law and for a new trial, "[t]he City got the same result from the judge as it did from the jury." Resp. Br. at 7. This argument ignores the distinction between making initial factual findings and reviewing a verdict under Federal Rule of Civil Procedure 50 to determine whether there is "no legally sufficient basis for a reasonable jury" to support a verdict. In refusing to grant judgment as a matter of law, the trial court did not conclude that a taking had occurred.

<sup>3</sup> The jury was instructed that, in order to find denial of all economically viable use of the property, "there must be a showing that after the action of the City that is being challenged here, the property is left with

made it impossible to know which of the two theories of takings liability the jury had accepted that the Ninth Circuit correctly recognized that it could affirm only if the jury's decision was legally sustainable with respect to *each* theory of liability. Pet. App. 10.

Respondents further mischaracterize the City's actions by asserting that, in rejecting Respondents' proposal, the City "announced that the only place that it had earmarked for the homes was also the only place to create a butterfly preserve for the [Smith's Blue Butterfly]." Resp. Br. at 5. The reality was quite different. Before Respondents even acquired the subject property, their predecessor and the City recognized that concerns over shoreline erosion and the requirements of the California Coastal Act would preclude development on the beach area, leaving the central portion of the property as the only area large enough for a proposed residential development. Jt. App. 57, 193-199; Tr. Exh. 24. Contrary to Respondents' rhetoric, the City did not "announce" an intent to create a "butterfly preserve" in this central portion of the property in lieu of the proposed development. To the contrary, when the City conditionally approved the 190-unit site plan in September of 1984, it acknowledged and accepted that much of the native habitat would be destroyed. Jt. App. 185-86, 251-52; R.T. 829. The City simply required that Respondents mitigate this harm by means of an appropriate restoration plan, which both Respondents and their predecessors knew would be required.<sup>4</sup> Jt. App. 273-80.

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no significant value." Jt. App. 304. Given that plaintiffs' own experts conceded that the property retained millions of dollars in value and was ultimately sold for \$4.5 million after the City's action (RT 602-604, 518-19), it seems unlikely that the jury would have concluded that the property had "no significant value" and imposed takings liability on a "denial of all use" theory.

<sup>4</sup> Respondents suggest that further efforts to modify their project would have been pointless because "the City" rejected five different development plans, even though these proposals were well below the applicable zoning limits, which permitted up to 1000 units on the property.

Respondents also suggest that this is not really a regulatory denial case because the development proposal presented to the City contemplated substantial dedication of property. Resp. Br. at 4-5. What Respondents fail to mention is that the property dedication included as part of Respondents' development proposal had nothing to do with the City's decision to deny this project.<sup>5</sup> The vast majority of the dedication contemplated by Respondents' proposal consisted of the beach-front area on the seaward side of the development line. Jt. App. 57. This proposed dedication was never the subject of any objection by Respondent and was completely unrelated to the City's decision in June of 1986 to deny this development due to access and habitat concerns.<sup>6</sup>

Respondents also repeatedly try to characterize the City's actions as having effected a total taking of their property. This

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Resp. Br. at 3-4 & n.3. These statements are misleading. When Respondents purchased the property in 1984, the local coastal plan regulating the property permitted a maximum density of seven units per acre for a maximum aggregate density of approximately 250 units. Tr. Exh. 28 at 15. Moreover, the City Council, which is the ultimate decisionmaker, considered only three proposed development plans. As the district court concluded in rejecting Respondents' substantive due process claim, these prior decisions by the City Council provide no basis upon which to infer an intent to preclude all development. Pet. App. 41-42.

<sup>5</sup> The contemplated dedications were included in Respondents' development proposal because both Respondents and the City recognized that it was required by the California Coastal Act and would be demanded by the California Coastal Commission, which had ultimate decision-making authority over the property. Jt. App. 193-98.

<sup>6</sup> Significantly, when Respondents purchased the subject property, the conditionally approved site plan proposal that they "acquired" with the property included all of the dedications about which they now complain. At no time thereafter did the City demand additional dedication of property. The price Respondents paid, and hence their "reasonable investment-backed expectations" regarding property, were necessarily based on the property as subject to all of these proposed dedications.



is not a "total taking" case. Respondents purchased the property for \$3.7 million in 1984. R.T. 511. Then, despite the City's rejection of the proposed 190-unit development, the property increased in value and was sold for \$4.5 million less than five years later.<sup>7</sup> R.T. 518-19. These undisputed facts do not equate to a total taking.

### III. RESPONDENTS' ANALYSIS OF WHETHER A RIGHT TO JURY TRIAL EXISTS FOR INVERSE CONDEMNATION PROCEEDINGS AVOIDS THE RELEVANT INQUIRIES.

#### A. Respondents' Attempt to Read a Right to Jury Trial Into the General Character of § 1983 Is Improper.

Respondents concede that the legislative history and plain meaning of 42 U.S.C. § 1983 evidences no express congressional intent to confer a statutory right to jury trial. In the absence of any express statement of intent, Respondents claim to have found congressional intent implied by the language in § 1983 creating liability for "an action at law."<sup>8</sup>

<sup>7</sup> Respondents complain that they were forced to sell the property to the State of California based upon a non-negotiable take-it-or-leave-it offer for less than half of its fair market value. Resp. Br. at 6. In fact, the State's offer was based upon an appraisal that ascribed a fair market value of \$4,500,000 to the property based on a highest and best use of condominium development of up to 150 units. R.T. 532-33, 535-37.

<sup>8</sup> Respondents argue that the onus is on the City to prove not only the absence of a right to jury trial, but the existence of a right *not to have a jury trial*. Resp. Br. at 10-11. This argument is seriously amiss. When a court is the proper decisionmaker, parties have a right to have the court make express findings of fact pursuant to Federal Rule of Civil Procedure 52. When a jury is erroneously permitted to resolve questions properly for the court, and the court considers itself bound to follow the jury verdict even though contrary to its own appraisal of the evidence, the result is *error*. See *II Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure* § 2887, at 476 (1995); see also Pet. App. 10. In fact, Respondents and the cases to which they cite, acknowledge that an

If § 1983 was adopted to address only a single category of wrong and if the statutory reference to "an action at law" was the only statutory remedy, Respondents' argument might have some force. However, Respondents' argument ignores the fact that "an action at law" is only one of the possible types of claims that can be brought under § 1983.<sup>9</sup> Section 1983 also encompasses "suits in equity" and all other "proper proceedings for redress." This reference to multiple types of actions is consistent with Congress's primary purpose in promulgating § 1983, which was to create a federal remedy for persons deprived of all types of constitutional rights. See *Haines v. Fisher*, 82 F.3d 1503, 1508 (10th Cir. 1996). Section 1983 is an empty vessel that provides a vehicle for vindicating rights elsewhere created. *Albright v. Oliver*, 510 U.S. 266 (1984); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 618 (1979). The determination of whether inverse condemnation claims are for a jury turns on the substantive nature of the claim itself, an inquiry that must be determined in accordance with the requirements of the Seventh Amendment.

erroneous trial by jury can only be treated as harmless "if [the court is] satisfied that the proper result was reached." Resp. Br. at 12 (quoting *Great American Ins. Co. v. Johnson*, 27 F.2d 71 (4th Cir. 1928)). In this case, the district court would almost certainly have reached a different result if it did not feel bound by the jury's verdict. Based on the same evidence relied on by the jury, the district court expressly concluded that the City had a legitimate basis for its decision and did not intend to "foreclose all reasonable development." Pet. App. 41-42.

<sup>9</sup> Contrary to the suggestion in footnote 17 of Respondents' Brief, none of the cases cited therein concludes that § 1983 creates a statutory right to jury trial. To the extent that they address the issue at all, the cases cited by Respondents merely demonstrate what the City already concedes, that there is a right to jury trial if the nature of the claim asserted under § 1983 is analogous to one traditionally subject to jury trial at common law. See, e.g., *Dolence v. Flynn*, 628 F.2d 1280, 1282 (10th Cir. 1981) (finding right to jury trial in § 1983 action brought by prisoner who was allegedly kicked and pushed down stairs because the "case at bar is clearly a garden variety tort action based on common law of assault and battery").

Respondents' argument that there exists a statutory right to jury trial also imputes a Congressional intent to interfere with state courts' procedures in inverse condemnation claims under § 1983. Regulatory takings claims must ordinarily be pursued initially in state courts. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). As documented in the amicus brief of the State Attorneys General, the overwhelming majority of state courts provide no right to jury determination of liability issues in state inverse condemnation proceedings. Nevertheless, a congressionally conferred right to jury trial under § 1983 would require that state courts provide jury trials for inverse condemnation claims brought under § 1983.<sup>10</sup> This conflict would significantly confuse and complicate the litigation of regulatory takings claims.

**B. Respondents Offer No Meaningful Basis for Finding a Seventh Amendment Right to Jury Trial in Inverse Condemnation Actions.**

**1. Respondents Provide No Basis to Ignore the Close Analogy to Direct Condemnation Actions, Which Do Not Implicate the Seventh Amendment.**

The preeminent question that determines whether a particular claim or issue carries with it a right to jury trial under the Seventh Amendment is whether that claim or issue was triable by a jury at common law or is analogous to one that was. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 378 (1996); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). The most obvious analogy to inverse condemnation actions is direct condemnation actions. Both actions arise out of the Takings Clause. Both actions are predicated on a government's taking of property for a public purpose.

<sup>10</sup> For example, if a state inverse condemnation action and a federal takings action were litigated seriatim in state court, a claimant in state court could contend that it had the right to assert the same claim first to a court (under state law) and then to a jury (under § 1983).

Both actions have as their focus the payment of just compensation.

Respondents' entire basis for rejecting the analogy between condemnation and inverse condemnation actions rests on the supposed distinction that condemnation actions involve compliance with the Takings Clause and inverse condemnation actions involve defiance of the Takings Clause. Based on this distinction, Respondents argue that the proper analogy for Seventh Amendment purposes is between inverse condemnation actions and other "constitutional torts" cognizable under § 1983. Essentially, Respondents assert that whenever a complaint contains a § 1983 claim and has a dollar sign in the prayer, the claimant is entitled to a jury trial.

Respondents' analysis operates at a level of abstraction that is not supported by Seventh Amendment jurisprudence. Respondents argue that the *general character* of § 1983 actions for damages implies a right to jury trial under the Seventh Amendment. This categorical approach to Seventh Amendment analysis is not only unpersuasive, but also contrary to this Court's clear directives. The Court has consistently held that the determination of whether there is a Seventh Amendment right to jury trial depends on the *nature* of the issues to be tried, not the *character* of the overall action. *See Ross v. Bernhard*, 396 U.S. 531, 538 (1970); *In re U.S. Financial Securities Litigation*, 609 F.2d 411, 422 (9th Cir. 1979). Under these precedents, the supposedly all-encompassing tort-like character of claims brought under § 1983 cannot be the starting point for Seventh Amendment analysis. Rather, the analog must be to the nature of the specific type of claim asserted under § 1983.

Respondents have offered no appropriate analog to inverse condemnation actions, and in fact have acknowledged, in other sections of their brief, the unmistakable kinship between condemnation and inverse condemnation actions. Resp. Br. at 39 (acknowledging the "'practical equivalence in this setting of negative regulation and appropriation.'" (quoting *Lucas*, 505 U.S. at 1019)). Respondents cannot have it both ways. They cannot equate regulatory and



direct takings for one purpose, but claim that regulatory takings are completely distinct from direct condemnation for purposes of the Seventh Amendment. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) ("The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners [does] not change the essential nature of the claim.").

**2. Respondents' Attempt to Lump Inverse Condemnation Claims Into a General Category with Other Constitutional Torts Ignores the Unique Character of Such Claims.**

Respondents' analysis inappropriately assumes that an inverse condemnation action under § 1983 is just like any other § 1983 action. In fact, there are meaningful differences between the nature of claims and remedies under the Takings Clause, and those arising under other constitutional amendments. Those differences affect the relevant Seventh Amendment analysis and demonstrate further why regulatory takings claims should be treated the same as direct condemnation proceedings and differently from other constitutional claims brought under § 1983.

With every constitutional right, other than inverse condemnation, money that is awarded to a claimant under § 1983 compensates for a government action that is *prohibited* by the Constitution. By contrast, in the context of inverse condemnation, the government action – the "taking" of property – is expressly *permitted* by the Constitution, as long as just compensation is paid. See *Eastern Enterprises*, 118 S.Ct. 2131, 2156 (Kennedy, J., concurring in part and dissenting in part) ("The [Takings] Clause operates as a conditional limitation, permitting the Government to do what it wants so long as it pays the charge."); *First English*, 482 U.S. at 314 (The Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power.").

Moreover, unlike other constitutional rights, the Fifth Amendment expressly prescribes the remedy for both direct

and inverse condemnation of property – payment of just compensation. The unique nature of the "just compensation" remedy demonstrates why Respondents' simplistic equation (§ 1983 + \$ = "jury trial") is incorrect. Because a taking is not prohibited under the Constitution, there is no "damage" from the government's action in effecting a "taking." There is only a "constitutional obligation to pay just compensation." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); see also *Jacobs v. United States*, 290 U.S. 13, 16 (1933) ("[A] promise [to pay] was implied because of the duty to pay imposed by the [Fifth] Amendment").

Moreover, even ignoring the unique Fifth Amendment origin of the just compensation remedy and employing a traditional Seventh Amendment analysis, the nature of the just compensation remedy does not support a right to jury trial. Not all claims for monetary relief constitute claims for "damages" giving rise to a right to jury trial under the Seventh Amendment. A monetary award can be either legal or equitable in nature. See *Department of Army v. Federal Labor Relations Authority*, 56 F.3d 273, 276 (1995). The legal remedy of money damages provides an injured party with a substitute for consequential loss, while the equitable remedy of specific relief attempts to give the very thing to which the claimant is entitled. See *id.* The concept of "just compensation," by its nature, is more akin to payment of a monetary entitlement in the nature of specific relief than a payment for consequential loss. Federal courts have consistently held that the measure of just compensation is limited to the fair market value of the property interests being taken, and that lost profits, loss of good will and other consequential losses are not recoverable as "just compensation." See *Wisconsin Central Limited v. Public Services Comm'n of Wisconsin*, 95 F.3d 1359 (7th Cir. 1996); *Mitchell v. United States*, 267 U.S. 341, 344-45 (1925); *United States v. 87.30 Acres of Land*, 430 F.2d 1130, 1132 (9th Cir. 1970).

The essentially equitable nature of the just compensation remedy is not, as Respondents argue, changed by the fact that, in the context of inverse condemnation, the claim is for wrongful withholding of the entitlement to just compensation.

To the contrary, in other contexts, courts have refused to characterize payments of entitlements as "damages" simply because they are wrongfully withheld. *See, e.g., Bowen v. Massachusetts*, 487 U.S. 879, 910 (1988) (order compelling Secretary of Health and Human Services to "undo [its] refusal to reimburse the State" was "specific relief" and not money damages); *see also Borst v. Chevron Corp.*, 36 F.3d 1308, 1324 (5th Cir. 1994); *Zellous v. Broadhead Assoc.*, 906 F.2d 94, 97 (3d Cir. 1990).

**C. Respondents Ignored the Fact that the Issues Raised in Inverse Condemnation Are Not of a Type Traditionally Resolved By Juries.**

Respondents do not deny that, even in cases that are subject to Seventh Amendment requirements generally, courts may be the appropriate decisionmaker for some issues. *See Markman*, 517 U.S. at 378 (1996); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 136 (1988). Nevertheless, Respondents assert that juries must resolve all inverse condemnation liability issues when regulatory taking claims are asserted under § 1983.

Respondents' argument is premised on the assumption that regulatory takings liability is a simple factual inquiry into the reasonableness of the government action. This premise is incorrect. Inverse condemnation claims have "proven difficult to explain in theory and to implement in practice. Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law." *Eastern Enterprises*, 118 S.Ct. at 2155 (Kennedy, J., concurring in part and dissenting in part). Determining inverse condemnation liability requires review of the local government's decision and evaluation of the factors that contributed to the relevant policy determinations.<sup>11</sup> Under well-established standards for reviewing such decisionmaking, the City Council's factual and policy

<sup>11</sup> Courts have repeatedly acknowledged and affirmed this truism. *See, e.g., Recupero v. New England Telephone & Telegraph Co.*, 118 F.3d 820 (1st Cir. 1997) ("Compared with judges, jurors typically have less

determinations are to be given substantial deference. *See II Davis & Pierce, Administrative Law Treatise* § 11.2, at 174; *see also Valley Citizens for a Safe Environment v. Aldridge*, 886 F.2d 458, 469 (1st Cir. 1989) (Breyer, J.). Conducting deferential review of factual and policy determinations is an inherently legal task. Juries find facts; they do not review factual findings.

Respondents incorrectly assert that, with the exception of *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (11th Cir. 1996), the City and amici could not "point to a single case decided in § 1983's 127-year history that denied plaintiff the right to a jury trial." Resp. Br. at 17. This assertion ignores numerous cases cited by the City and others in which courts have found that a jury would not be appropriate to determine liability issues in § 1983 actions involving local land use regulation. *See, e.g., Pearson v. City of Grand Blanc*, 961 F.2d at 1211, 1222 (6th Cir. 1992) ("[W]e hold that the application of this deferential standard of review is a matter of law for the court. Otherwise federal juries would sit as local boards of zoning appeals."). Respondents in effect admit that there are exceptions to this general rule by conceding in their brief that their own § 1983 substantive due process claim was tried to the court, but nowhere suggesting that it was improper for the court to decide that claim. Indeed, they cannot because the weight of authority is decidedly against them. *See Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 682 (3rd Cir. 1991).

To deflect attention from these concerns about jury competence, Respondents extol the virtues of the jury process and assert that citizens who comprise juries are fully capable of deciding policy issues. Respondents miss the point. Certainly, individual jurors can be expected to have their own views on matters of policy. However, the six people sitting on a federal

experience and training relevant to competence to review decisions of others with an appropriate degree of deference while at the same time assuring no misunderstanding or misapplication of governing law.").



jury are not the duly elected policy makers of the local government.<sup>12</sup> The Seventh Amendment does not contemplate allowing these six citizens to review policy determinations.<sup>13</sup>

Respondents also assert that juries are frequently called upon to "judge the reasonableness" of local government policy decisions. Resp. Br. at 14-15. It is wrong to suggest that juries could or should usurp governmental functions in this way, and none of the cases cited by Respondents so hold. At best, in those cases that were otherwise subject to the Seventh Amendment, juries are allowed to resolve factual issues and impose liability for constitutional transgressions that may result from governmental policy.<sup>14</sup> They do not act as super

<sup>12</sup> Respondents also miss the mark in arguing that jurors buffer the "unwholesome closeness" that is presumed to exist between local government officials and local judges. Resp. Br. at 14 n.13. Whatever "unwholesome closeness" may be presumed to exist between local officials and state judges cannot be imputed to federal judges.

<sup>13</sup> Respondents point to the initiative or referendum process as evidence that citizens are institutionally competent to second guess policy decisions of elected officials. However, in these contexts, it is the entire electorate that decides the policy issue. That there exists a means for voters to review political decisions says nothing about the propriety of allowing a six-person jury to make those decisions. In voting for legislation, citizens are exercising political decisionmaking power. In reviewing governmental actions as federal jurors, citizens are trenching on political decisionmaking power exercised by their elected representatives. See *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) ("Federalism and comity demand a reluctance by federal courts 'to trench on the prerogatives of state and local . . . institutions.'").

<sup>14</sup> For example, Respondents cite *Roma Constr. Co. v. Russo*, 96 F.3d 566 (1st Cir. 1996) for the proposition that juries assess the reasonableness of a broad range of municipal "policies." That case considered a Rule 12(b)(6) dismissal of a § 1983 claim alleging that town officials extorted money from a construction company. "Policy" was only raised in the other context of determining whether the extortion plan could be imputed to the town. Indeed, it should be noted that *Roma Construction*, and many of the other cases cited by Respondents in footnote 15 of their brief, were never submitted to a jury. See, e.g., *Berkeley v. Common Council*, 63 F.3d 295 (4th Cir. 1995) (*en banc*) (reviewing Rule 12(b)(6) dismissal); *Turner v.*

legislators dispensing liability whenever they find government policies to be unreasonable. Given the complexity of the necessary policy determinations, the separation of powers and federalism concerns raised, and the delicate balance that must be struck, courts are the proper decisionmakers for determining whether governmental regulations or decisions constitute regulatory takings.

#### IV. RESPONDENTS' DEFENSE OF THE NINTH CIRCUIT'S REASONABLENESS STANDARD OF REVIEW MISSES THE POINT.

In defending the Ninth Circuit's *de novo* reasonableness standard, Respondents contend that the City is advocating that local land use decisionmaking be exempt entirely from judicial review. In particular, Respondents suggest that deferential review of local land use decisions would somehow mean that there could be no liability for a regulatory taking under any circumstances. Resp. Br. at 41. This argument is nothing but a straw man. The City has never contended that its actions should be immune from judicial scrutiny under the Takings Clause, and it is absurd for Respondents to characterize the City's arguments in this fashion. What the City contests is the propriety of allowing juries to impose inverse condemnation liability based upon *de novo* reassessments of conflicting facts and policy judgments.

To support their straw man argument, Respondents cite *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), for the proposition that "specific applications of zoning power have always been subject to judicial review." Resp. Br. at 34. The City has never contested either this proposition or the deferential standard of review articulated in *Nectow*. 277 U.S. at 187.

Respondents also assert that *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), somehow altered the

*Upton County*, 915 F.2d 133 (5th Cir. 1990) (same). Accordingly, these cases cannot be relied on to support the proposition that juries are frequently called on to resolve policy issues.

deference historically accorded to local land use decision-makers. However, *Lucas* did not involve judicial review of the government's determination that the challenged regulation related to a beneficial purpose. That was conceded by all parties in *Lucas*. The issue in *Lucas* was whether and under what circumstances takings liability could be avoided if a challenged regulation was well intended, but deprived property of all use. The Court's comments relating to the "public nuisance" showing required to avoid liability in these circumstances did not relate at all to whether the government's liability for regulatory takings could be tested under a *de novo* reasonableness standard in the first instance.

Standards of takings liability should provide "some necessary predictability for governmental entities." *Eastern Enterprises*, 118 S.Ct. at 2155 (Kennedy, J., concurring in part and dissenting in part). The record in this case illustrates clearly how and why the *de novo* reasonableness standard applied by the Ninth Circuit and advocated by Respondents would make such predictability totally impossible.

In considering Respondents' development proposal, the City Council was faced with conflicting information. Respondents' consultant testified that the Smith Blue Butterfly ("SBB") had not been spotted on the subject property until 1984. Resp. Br. at 3. On the other hand, the biological opinion issued by the USFWS had concluded that "even moderately conscientious (sic) search surveys" would have resulted in earlier sightings of the SBB on the subject property. Jt. App. 74. Respondents presented evidence that the subject property was of limited environmental significance with limited potential. Resp. Br. at 2. However, USFWS and others advised that the subject property had great environmental significance, that the SBB habitat on the property was increasing and that the property would soon become an "active pathway" for genetic interchange for the SBB. Jt. App. 66-86, 202-05. Respondents' consultant opined that his restoration plan was adequate. Representatives from USFWS, the California Department of Fish and Game and others concluded that it was inadequate. Without question, there was a substantial factual basis for the City's determination that denial of the

proposed project and its restoration plan would further legitimate environmental concerns.<sup>15</sup>

Respondents in effect urge that the City's liability depend not on the existence of such a factual basis for the City's decision, but on the credibility of conflicting witnesses. Under this standard, the predictability of governmental liability will be a function of how accurately the local government can predict how a jury will assess issues of credibility, policy and reasonableness. The result would be uncertainty for public entities and potential liability in virtually every case.

#### V. RESPONDENTS' DEFENSE OF THE ROUGH PROPORTIONALITY STANDARD IGNORES THE LEGAL AND PRACTICAL DIFFERENCES BETWEEN EXACTIONS AND REGULATORY DENIALS.

Central to the Ninth Circuit's analysis was the application of the rough proportionality concept in evaluating the City's denial of Respondents' condominium project. Yet, Respondents pay scant attention to this issue. Respondents do not respond to the practical and conceptual difficulties involved in applying that standard in a regulatory denial context. Instead, Respondents merely argue that the Ninth Circuit's reference to that standard was gratuitous and, in any event, "rough proportionality" is an appropriate standard to measure the legality of governmental action. Resp. Br. at 42-45.

<sup>15</sup> Certainly, the City cannot be faulted for preferring the expert opinion of the USFWS over the opinion of Respondents' hired consultant. The USFWS was not an interested party and it has substantial expertise in assessing the potential success of restoration plans. The City afforded the USFWS no more deference than this Court has repeatedly insisted is due to governmental agencies. Cf. *Federal Power Commission v. Florida Power & Light Co.*, 404 U.S. 453, 467 (1972) (citing agency's technical expertise and experience as one reason why courts defer to administrative agency decisionmaking).



The Ninth Circuit's reliance on a rough proportionality standard was not a mere afterthought, incidental to its decision. On the contrary, in upholding the jury's decision, the Ninth Circuit based its decision squarely on a standard of rough proportionality, and it evaluated the sufficiency of evidence to sustain a jury's decision based upon that standard. Pet. App. 17-18. The Ninth Circuit unequivocally asserted that "[e]ven if the City had a legitimate interest in denying Del Monte's development application, its action must be 'roughly proportional' to furthering that interest." Pet. App. 16. Accordingly, the Ninth Circuit's decision cannot be upheld unless the Ninth Circuit's extension of "rough proportionality" into the regulatory denial context was correct.

On the merits, Respondents assert that the concept of proportionality is found everywhere in takings law.<sup>16</sup> However, Respondents have not identified a single regulatory denial case that has imposed inverse condemnation liability on the basis of a "rough proportionality" standard. This absence of authority is not surprising because the rationale articulated in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), does not apply in regulatory denial cases. Denials do not involve the physical appropriation of property interests that was critical to the *Dolan* analysis.

Contrary to Respondents' assertion, *Lucas* provides no support for Respondents' embrace of this type of proportionality standard. In *Lucas*, the Court rejected the proportionality-based argument that a total taking could be justified if the regulation furthered compelling public interests. Instead, the Court adopted a more categorical approach to reviewing regulations that admittedly deprived property of all economically beneficial use. For those cases, the government

can only avoid paying past compensation if the activity proposed by the property owner would be akin to a public nuisance. The Court identified various factors to be considered in determining whether the proposed use would satisfy this public nuisance test. This test only comes into play *after* a "total taking" has been found. These factors have no applicability in determining *whether* a taking has occurred. Additionally, the public nuisance evaluation contemplated by *Lucas* did not involve a proportional weighing of regulatory benefits against project impacts. In fact, by rejecting the argument that a total taking could be justified by strong regulatory benefits, the *Lucas* court impliedly rejected a proportionality based approach to takings cases in favor of a more categorical approach.

Respondents' own formulation of the "rough proportionality" standard in the context of this case most clearly illustrates its unworkability. According to Respondents, this standard requires the jury to compare "the proposed development with surrounding land uses and [evaluate] such intangibles as 'social value' and 'suitability.'" Resp. Br. at 44. Based upon this analysis, Respondents assert that the jury should impose inverse condemnation liability for a project denial unless it concludes "that the harm caused by the proposed development is disproportionate (*i.e.*, its burden outweighs its utility). . . ." Resp. Br. at 44. Thus, in some undefinable way, juries would be asked to mentally tabulate all of the tangible and intangible burdens resulting from a project and balance those burdens against all of the tangible and intangible benefits resulting from the project, and decide, as a factual matter, whether the burdens outweigh the benefits, presumably giving no deference to the factual and policy determinations of the local governmental decisionmaker. Attempting to strike such a complex balance between such incommensurable and unquantifiable factors would befuddle courts and bewilder juries. Cf. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) ("[T]he scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging

<sup>16</sup> In the broadest sense, a regulation or land use decision that furthers a legitimate public interest but deprives property of all economically viable use can be said to impose a "disproportionate" burden on that property. However, the normative conclusion that a regulative or land use decision imposes a "disproportionate" burden is a far cry from a balancing test based on a "rough proportionality" standard.

whether a particular line is longer than a particular rock is heavy.") (Scalia, J., concurring)

## VI. CONCLUSION

For all of the reasons set forth above, the City respectfully requests that the Ninth Circuit's decision in this matter be reversed.

Respectfully submitted,

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**In the Supreme Court of the United States**

OCTOBER TERM, 1997

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CITY OF MONTEREY, PETITIONER

*v.*

DEL MONTE DUNES AT MONTEREY, LTD., ET AL.

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER  
IN PART**

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## QUESTIONS PRESENTED

The brief for the United States will address the following questions:

1. Whether the "rough proportionality" standard set forth in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which was established to review a permit condition that required the permittee to dedicate property to the public, applies to a restriction on the use of land that does not entail a dedication.

2. Whether the court of appeals erred in sustaining the jury verdict in this case on the ground that a reasonable jury could have credited respondents' evidence and discredited that proffered by the City, and could on that basis have concluded that the City's regulatory action bore an insufficient nexus to a legitimate governmental purpose.

3. Whether a land-use restriction that does not substantially advance a legitimate public purpose can be deemed, on that basis alone, to effect a taking of property requiring the payment of just compensation.



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**In the Supreme Court of the United States**

OCTOBER TERM, 1997

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No. 97-1235

CITY OF MONTEREY, PETITIONER

*v.*

DEL MONTE DUNES AT MONTEREY, LTD., ET AL.

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER  
IN PART**

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**INTEREST OF THE UNITED STATES**

This case concerns a challenge under the Just Compensation Clause of the Fifth Amendment to a city's denial of a development permit. The permit denial was based in part on the city's conclusion that the development would damage habitat of the Smith's Blue Butterfly, a species listed as endangered under the Endangered Species Act of 1973 (ESA). Although the permit was not denied under the authority of the ESA, the United States has an interest in ensuring that local land-use officials have the flexibility to take reasonable measures under state and local law to protect endangered species.

More generally, this case raises important issues regarding the circumstances under which government



action may give rise to liability under the Just Compensation Clause. The federal government administers many programs that restrict the use of private property in order to protect human health, public safety, the environment, and other vital interests. The United States has an interest in the sound development of takings jurisprudence in cases that may affect its ability to implement those programs consistent with constitutional protections for private property.<sup>1</sup>

### STATEMENT

1. The property at issue in this case consists of 37.6 oceanfront acres in Monterey, California. See *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1499 (9th Cir. 1990) (*Del Monte I*). The property's native flora includes

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<sup>1</sup> The United States has no direct interest in whether respondents have a statutory or constitutional right to jury trial in this inverse condemnation action. The statute under which respondents' suit was brought is not available to challenge the exercise of federal regulatory authority, since it applies only to persons acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." 42 U.S.C. 1983. And "[i]t has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government." *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981); see also *United States v. Reynolds*, 397 U.S. 14, 18 (1970) (no constitutional right to jury in eminent domain proceedings). The United States has a substantial interest in continued recognition of the principle that no Seventh Amendment right to jury trial exists either in suits against the United States or its agencies, or in eminent domain actions brought by the federal government. Neither respondents nor the court of appeals, however, has called that principle into question. See Resp. C.A. Br. 17 ("The City is correct that there is no constitutional right to jury trial in a direct condemnation action brought by the United States."); Pet. App. 8. Because the decision in this case is unlikely to affect the manner in which either eminent domain or inverse condemnation actions involving the federal government are tried, the United States takes no position on the question whether the instant suit was properly submitted to a jury.

buckwheat, the natural habitat of the Smith's Blue Butterfly (*ibid.*), a species listed as endangered under Section 4 of the ESA, 16 U.S.C. 1533. See 50 C.F.R. 17.11; 41 Fed. Reg. 22,041 (1976).

In 1981, Ponderosa Homes, the previous owner of the site, sought a permit from petitioner City of Monterey to build a 344-unit residential complex on the property. Pet. App. 3; *Del Monte I*, 920 F.2d at 1502. After denying several development proposals, in 1984 the City Council approved a site plan for 190 residential units, subject to the requirement that Ponderosa satisfy 15 conditions within 18 months. *Id.* at 1502-1503. In late 1984, respondents purchased the property for approximately \$3.7 million. Respondents continued to pursue final approval of the permit application for the 190-unit proposal by seeking to satisfy the conditions the City Council had specified. *Id.* at 1504-1506; Pet. App. 3.<sup>2</sup>

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<sup>2</sup> Pursuant to Section 7 of the ESA, 16 U.S.C. 1536, the United States Fish and Wildlife Service (FWS) prepared a biological opinion, dated March 22, 1985, concerning the anticipated effects of respondents' proposed development on the Smith's Blue Butterfly. J.A. 66-83; see generally *Bennett v. Spear*, 117 S. Ct. 1154, 1159 (1997) (describing preparation of biological opinions). The biological opinion was prepared for the Veterans Administration's Loan Guaranty Division in connection with proposed federal home loan guaranties for veterans wishing to purchase condominiums within the development. See J.A. 66-68. The FWS concluded that the project could be expected to destroy the butterfly's habitat at the site of the development, but the agency was "unable to conclude that loss of the \* \* \* site will threaten the survival and recovery of the species as a whole." J.A. 78. The FWS expressed the view that respondents' proposed restoration plan for the site "has little chance for long term success." *Ibid.* The FWS also anticipated that some "takings" (see 16 U.S.C. 1538, 1539; *Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. 687, 699 (1995)) of the butterfly would occur, but that "given the present circumstances, numerical losses will be small and of little consequence to the species as a whole." J.A. 81. In addition, the FWS "recommend[ed]," without purporting to require, that "the project be redesigned to preserve at

In June 1986, the City denied respondents' permit application for the proposed development. A resolution adopted by the City Council gave six reasons for its denial of the application. See *Del Monte I*, 920 F.2d at 1504-1505. The resolution explained that the project was expected to have significant adverse environmental impacts, including injury to the habitat of the Smith's Blue Butterfly. *Ibid.* The City also expressed concern that the design for the project did not provide adequate access to and from the property. *Id.* at 1504.

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least the larger colonies of host buckwheat in the east corner of the property." J.A. 81-82. See also J.A. 150-152 (FWS letter, in response to inquiry from Sierra Club, reiterating views previously stated in biological opinion).

If respondents' development were proposed today, it might be addressed differently under the ESA. First, in the biological opinion issued by the FWS in 1985 concerning respondents' property, the discussion of the FWS's misgivings about the proposed restoration plan followed immediately after the explanation of the FWS's conclusion that the development would not be likely to jeopardize the continued existence of the butterfly. Under regulations issued in 1986 (see 51 Fed. Reg. 19,926) to govern the Section 7 consultation process, such advisory, non-binding recommendations would be included in a separately entitled section of the document and would be clearly identified as advisory. See 50 C.F.R. 402.14(j).

Second, the FWS's stated expectation that development of the property would "take" butterflies might lead the developer itself to seek a permit from the FWS under Section 10(a)(1)(B) of the ESA, 16 U.S.C. 1539(a)(1)(B), to allow incidental take of the butterfly according to the terms of an approved conservation plan. See *Sweet Home*, 515 U.S. at 700-701, 707-708. We have been informed by the Department of the Interior that although the incidental take permit provision was added to the ESA in 1982, it was little used until after 1994, when the FWS and the National Marine Fisheries Service (which has ESA responsibility for marine species) issued the "no surprises" policy to provide greater certainty to holders of incidental take permits. That policy was subsequently codified by regulation. See 63 Fed. Reg. 8859 (1998).

2. Respondents filed suit in federal district court pursuant to 42 U.S.C. 1983. They alleged, *inter alia*, that the permit denial violated their rights under the Just Compensation Clause of the Fifth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The district court dismissed the takings claim as unripe (see *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1664-1667 (1997)), and it dismissed the remaining claims as both unripe and inadequately stated. See *Del Monte I*, 920 F.2d at 1499.

The court of appeals reversed and remanded for further proceedings. *Del Monte I*, 920 F.2d at 1509. The court concluded that further participation by respondents in the permit application process would be futile, thereby satisfying the "final decision" prong of the *Williamson County* ripeness doctrine. *Id.* at 1501-1506. The court acknowledged that a takings claim is ordinarily unripe under *Williamson County* until the property owner has also sought, and been denied, an opportunity to obtain just compensation. *Ibid.* It held, however, that respondents' claim nevertheless was ripe because, under California law, no mechanism for seeking compensation for a regulatory taking had been available at the time respondents' permit application was finally denied. *Id.* at 1506-1507. The court also reversed the district court's dismissal of respondents' due process and equal protection claims, concluding that the evidence was sufficient to raise a triable issue as to whether the denial of respondents' permit application was arbitrary and irrational. *Id.* at 1508-1509.

In 1991, after the case was remanded to the district court, the State of California purchased the property from respondents for \$4.5 million, \$800,000 more than respondents had paid for the site in 1984. Pet. App. 21. The case thereafter proceeded to trial in the district



court. The court determined that it would decide respondents' substantive due process claim, but that the takings and equal protection claims would be tried to a jury. *Id.* at 3, 32-34.

On the takings claim, the court instructed the jury that it should find for respondents if the permit denial either (1) deprived respondents of "all economically viable use of the property" or (2) "did not substantially advance a legitimate public purpose." J.A. 303. The court explained that "[i]n order to find that the plaintiff has been denied all economically viable use of the property, there must be a showing that after the action of the City that is being challenged here, the property is left with no remaining significant value." J.A. 304. The court also stated that "[t]he regulatory actions of the City or any agency substantially advance[] a legitimate public purpose if the action bears a reasonable relationship to that objective." *Ibid.* The jury found in favor of respondents on both their takings and equal protection claims, and it awarded respondents \$1,450,000. Pet. App. 3.

After trial, the district court ruled for petitioner on the substantive due process claim, finding that the permit was denied "for valid regulatory reasons." Pet. App. 41. The court concluded that "the quantity of time and money invested by the [city staff] \* \* \* is demonstrative of conduct which is not arbitrary and irrational, but was for valid purposes." *Id.* at 41-42. The court found that the evidence before the City was in conflict, and that "there were differences of opinion" regarding the effect of the proposed development on the Smith's Blue Butterfly and its habitat. *Id.* at 42. The court concluded that "the City Council was not acting arbitrar[il]y and irrationally in [denying the permit], it was acting for valid regulatory reasons and not attempting to forestall all reasonable development." *Id.* at 43. With respect to the takings and equal protection claims, however, the court entered judg-

ment on the jury's verdict and denied petitioner's motions for judgment as a matter of law and for a new trial. *Id.* at 3-4.

3. The court of appeals affirmed. Pet. App. 1-29.

A. The court first held that 42 U.S.C. 1983 afforded respondents a right to jury trial on their takings claim. The court determined that respondents' inverse condemnation suit was analogous to various forms of actions at law, including eminent domain actions brought by the government, suits for trespass, and actions to recover damages for conversion of personal property. Pet. App. 8-9. The court stated as well that respondents "seek[] compensatory or 'legal' damages." *Id.* at 9. The court of appeals also concluded that both theories of liability—denial of economically viable use and failure to substantially advance a legitimate purpose—presented essentially factual issues appropriate for jury resolution. *Id.* at 10-15.

B. The court of appeals also held that a reasonable jury could have found for respondents on both theories of takings liability. The court stated that "[e]ven if the City had a legitimate interest in denying [respondents'] development application, its action must be 'roughly proportional' to furthering that interest." Pet. App. 16 (citing *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994)). It observed that respondents had presented evidence calling into question each of the six reasons (see p. 4, *supra*) given to support petitioner's denial of their permit application. Pet. App. 17-19. Asserting that "[t]he jury was entitled to credit [respondents'] experts, and discredit the City's testimony," *id.* at 18, the court held (*id.* at 19-20) that a rational juror could have concluded that the denial of respondents' permit application lacked a sufficient nexus with the City's stated objectives.

The court of appeals likewise held that the jury reasonably could have found that petitioner had deprived respondents of all economically viable use of the property.

The court rejected petitioner's argument that the subsequent sale of the property to the State for \$4.5 million—\$800,000 more than respondents had paid for the land—necessarily established that some economically viable use remained. Pet. App. 21-23. The court also rejected petitioner's contention that because respondents had failed to submit an application proposing a less extensive development, the jury could not reasonably have found a denial of all economically viable use. The court stated that the evidence, viewed in the light most favorable to respondents, supported a finding that any further development application would have been futile. *Id.* at 26.<sup>3</sup>

### SUMMARY OF ARGUMENT

A. The "rough proportionality" standard announced by this Court in *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), is inapplicable to the instant case. That standard applies only where a governmental body's approval of private development is conditioned on a dedication of property; it does not apply to regulation that simply restricts the owner's use of his own land. Both *Dolan* and its predecessor, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), rest on the premise that a permanent physical occupation of real property is different in kind from other forms of land-use regulation. The court of appeals therefore erred in holding that the denial of respondents' permit application must be "roughly proportional" to the City's various environmental and other concerns.

B. The court of appeals also erred in holding that the existence of conflicting evidence as to the likely effects of respondents' development proposal provided a basis for

<sup>3</sup> The court of appeals also rejected petitioner's challenge to the amount of damages awarded by the jury. Pet. App. 27-29. Because the court affirmed the damages award on the takings claim, it declined to address petitioner's challenges to the jury's verdict on the equal protection claim. *Id.* at 6.

affirming the jury's determination that a taking had occurred. The jury was instructed that it could find for respondents on their takings claim if it concluded that the permit denial bore no reasonable relationship to a legitimate governmental objective. In affirming the district court's denial of petitioner's motion for judgment notwithstanding the verdict, the court of appeals emphasized that the record contained conflicting evidence regarding the validity of the City's environmental concerns. Contrary to the court of appeals' analysis, however, the existence of conflicting evidence would not authorize the jury to determine for itself whether the proposed development would have had unacceptable environmental or other consequences; rather, it would compel the conclusion that the City had a rational basis for denying the permit application. Moreover, under established principles, the determination whether legislative or administrative bodies have acted reasonably is a question of law subject to de novo review in the court of appeals, not a question of fact subject to deferential review.

C. This Court has stated in dictum that land-use regulation may effect a taking if it does not substantially advance a legitimate governmental purpose. We believe, however, that that dictum is ultimately irreconcilable with the principles underlying this Court's regulatory takings jurisprudence. The fundamental justification for treating land-use regulation as a taking is, and has always been, that certain forms of regulation have (for the owner) the same practical consequences as a direct appropriation. Requiring compensation in such cases ensures that the costs of legitimate public programs will not be unfairly concentrated on discrete individuals. That justification does not apply to land-use restrictions that are objectionable only because they bear no reasonable relationship to a legitimate public purpose. Such restrictions violate principles of substantive due process, but they do not



effect a taking, and they do not trigger a constitutional obligation to provide compensation for losses suffered during the period that the restrictions remain in effect.

### ARGUMENT

#### THE COURT OF APPEALS APPLIED INCORRECT LEGAL STANDARDS IN AFFIRMING THE DISTRICT COURT'S JUDGMENT ON RESPONDENTS' TAKINGS CLAIM

##### A. The "Rough Proportionality" Test Announced By This Court In *Dolan v. City Of Tigard* Is Inapplicable To Land-Use Restrictions Not Involving Compelled Dedications Of Property

The court of appeals in this case "assume[d] that the City's stated interests of protecting the environment and health and safety of its citizens were legitimate." Pet. App. 16. It stated, however, that "[e]ven if the City had a legitimate interest in denying [respondents'] development application, its action must be 'roughly proportional' to furthering that interest." *Ibid.* (citing *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994)). The court of appeals erred in invoking the "rough proportionality" standard in this case.<sup>4</sup> This Court's decisions make clear that the "rough proportionality" standard applies only where land-use regulation involves a compelled dedication of real property.

1. The Court's identification of the distinct nature of compelled dedications finds its roots in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), in which the Court analyzed the relevant precedents and "conclude[d] that a permanent physical occupation authorized by government is a taking without

<sup>4</sup> Indeed, because the jury was not instructed to apply a "rough proportionality" standard (see J.A. 302-305), it does not appear that such a basis for a taking claim was properly before the court of appeals.

regard to the public interests that it may serve." The Court observed that "[i]n such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation." *Id.* at 441. The Court emphasized, however, that its holding was "very narrow," and that it "d[id] not \* \* \* question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property." *Ibid.*

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the California Coastal Commission conditioned approval of new beachfront construction on the landowner's agreement to provide a public easement across the property. *Id.* at 828-829. Relying principally on *Loretto*, the Court began its analysis by observing that such an easement requirement, if imposed unilaterally by the State, would have effected a taking of property requiring the payment of just compensation. *Id.* at 831. It then addressed the question whether the requirement of public access could nonetheless be made a condition of a permit for further development. The Court held that where a permit denial would advance a legitimate government purpose and would not itself constitute a taking, the permit may be conditioned on a dedication of property that serves the same purpose. *Id.* at 835-837. Where such a permit condition fails to advance the same purpose as the denial, however, "the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was." *Id.* at 837. The purpose becomes the acquisition of an easement without the payment of compensation, an impermissible result under the Just Compensation Clause. *Ibid.*

Finally, in *Dolan*, the Court further clarified the nature of the showing that a regulatory body must make in order

to require the dedication of land as a condition of a development permit. The landowner in that case applied for a municipal permit to expand her plumbing and electric supply store. As a condition of the permit, the City of Tigard required her to dedicate a portion of her property to the city for use as a public greenway and pathway for bicycles and pedestrians. 512 U.S. at 379-380. The Court observed that "[w]ithout question, had the city simply required petitioner to dedicate a strip of land \* \* \* for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred." *Id.* at 384. It held that to avoid takings liability, the City was required to show that the extent of the required dedication was roughly proportional to the expected adverse impact of the proposed development. *Id.* at 388-391.

The *Dolan* Court acknowledged that "the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as \* \* \* *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)." 512 U.S. at 384. The Court distinguished zoning and other land-use restrictions from the dedication requirement imposed by the City of Tigard, explaining that "the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city." *Id.* at 385. The Court emphasized that such public access requirements deprive the owner "of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id.* at 384 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).<sup>5</sup>

<sup>5</sup> The Court in *Dolan* also relied in part on "the well-settled doctrine of 'unconstitutional conditions.'" 512 U.S. at 385. As its name suggests, that doctrine applies only where the government makes available a

2. Thus, *Dolan*, like *Nollan*, rests on the view that compelled dedications of property to the public warrant closer judicial scrutiny than do restrictions on the owner's use of her land, even where the dedications are made a condition of other development rather than imposed unilaterally by governmental authorities, as in *Loretto*. The Court in *Nollan* observed that judicial scrutiny of land-use regulation should be particularly searching "where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." 483 U.S. at 841.<sup>6</sup> Similarly, *Dolan* derived its proportionality test from the analysis used by some state courts to determine whether a dedication "is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit." *Dolan*, 512 U.S. at 390 (quoting *Simpson v. North Platte*, 292 N.W.2d 297, 301 (Neb. 1980)). With respect to land-use regulation that does not involve a compelled dedication, however, neither *Nollan* nor *Dolan* purports to curtail the "broad power" of governmental bodies "to impose appropriate restrictions upon an owner's use of his property." *Loretto*, 458 U.S. at 441.<sup>7</sup>

discretionary benefit, subject to a condition that the Constitution would prohibit the government from imposing unilaterally. It has no application to an outright denial of a land-use permit.

<sup>6</sup> See also Frank Michelman, *Takings*, 1987, 88 Colum. L. Rev. 1600, 1608-1609 (1988) (*Nollan* is limited to government-compelled permanent occupations of property, a reading that "fully explain[s] the opinion and its result, without, implausibly, turning *Nollan* into *Lochner* redivivus.").

<sup>7</sup> With the exception of the court of appeals in the instant case, virtually every lower federal court to consider the issue has held that *Dolan*'s "rough proportionality" test is inapplicable to land-use



Nor would it make any sense to transplant the *Dolan* approach to the quite different setting of ordinary land-use regulation. The court of appeals made no real effort to explain how a court (let alone a jury) should determine whether denial of a development permit is "roughly proportional" to a municipality's environmental and other concerns. Especially where the government acts in response to *cumulative* risks posed by the use of property by more than one owner, it would often be difficult or impossible to quantify with any precision the marginal risk posed by a specific project. In other situations, regulation of the development of a single parcel may serve a variety of purposes, such as alleviating traffic congestion, protecting against flooding or mudslides, ensuring compliance with clean water standards, preserving habitat

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restrictions not involving compelled dedications of property. See, e.g., *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1088 (11th Cir. 1996) (*Dolan* and *Nollan* are irrelevant to a takings challenge to a land-use restriction that does not compel a dedication of property for public use), cert. denied, 117 S. Ct. 2514 (1997); *Goss v. City of Little Rock*, 90 F.3d 306, 308-310 (8th Cir. 1996) (while *Dolan's* rough proportionality test applies to a permit condition that compels a dedication of property, permit denials and other traditional land-use regulation warrant a more deferential standard of review); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1579 (10th Cir. 1995) ("the 'essential nexus' and 'rough proportionality' tests [from *Nollan* and *Dolan*] are properly limited to the context of development exactions"); *Marshall v. Board of County Comm'rs for Johnson County*, 912 F. Supp. 1456, 1472-1474 (D. Wyo. 1996); *Harris v. City of Wichita*, 862 F. Supp. 287, 293-294 (D. Kan. 1994), aff'd, 74 F.3d 1249 (10th Cir. 1996) (Table). But see *Unity Real Estate Co. v. Hudson*, 889 F. Supp. 818, 840 (W.D. Pa. 1995). State court decisions are largely in accord with the prevailing view in the federal courts. See, e.g., *Landgate, Inc. v. California Coastal Comm'n*, No. S059847, 1998 WL 214431, at \*10 (Cal. Apr. 30, 1998); *Home Builders Ass'n v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz.) (in banc), cert. denied, 117 S. Ct. 2512 (1997); *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995); *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996).

for endangered species, and promoting (through density and other limitations) the amenities necessary for the community that will remain after the developer completes its work. It would be equally impossible in such a situation to ascertain whether each of numerous (and often overlapping) restrictions was roughly proportional to cumulative harms on a single parcel.

Because the court of appeals did not attempt to explain how a rough proportionality standard could be sensibly implemented by land-use agencies or courts in this quite different setting, the practical import of the court's analysis is not altogether clear. It threatens, however, to be quite disruptive of long-accepted practices in land-use regulation. There is no justification in Fifth Amendment jurisprudence for imposing such a limitation on the flexibility of local governments in addressing health, safety, and environmental concerns. The evident purpose of *Nollan* and *Dolan* was to ensure that development restrictions involving compelled dedications of property are subjected to closer judicial scrutiny than other land-use regulation. Invocation of the "rough proportionality" standard to the instant case therefore stands the reasoning of *Nollan* and *Dolan* on its head.

**B. The Court Of Appeals Erred In Holding That The Existence Of Conflicting Evidence Before Municipal Regulators Provided A Basis For Finding That A Taking Had Occurred**

The district court instructed the jury that it could find for respondents on their takings claim if the permit denial "did not substantially advance a legitimate public purpose." J.A. 303. The court explained that "[t]he regulatory actions of the City or any agency substantially advance[] a legitimate public purpose if the action bears a reasonable relationship to that objective." J.A. 304. In affirming the district court's denial of petitioner's motion

for judgment notwithstanding the verdict, the court of appeals emphasized that the record contained conflicting evidence regarding the validity of the City's environmental concerns. See Pet. App. 17-20. The court of appeals reasoned that "[t]he jury was entitled to credit [respondents'] experts, and discredit the City's testimony." *Id.* at 18. It then concluded (*id.* at 19-20):

In light of the evidence proffered by [respondents], the City has incorrectly argued that no rational juror could conclude that the City's denial of [respondents'] application lacked a sufficient nexus with its stated objectives. Significant evidence supports [respondents'] claim that the City's actions were disproportional to both the nature and extent of the impact of the proposed development.

That approach fundamentally misconceives the roles of both trial and appellate courts in reviewing the reasonableness of governmental action. Review for rationality does not entail resolution of credibility disputes or reweighing of the evidence that was before the governmental body that issued the challenged decision. Moreover, the ultimate determination as to the rationality of the challenged decision is a determination of law subject to de novo review. The court of appeals itself therefore should have determined, as a matter of law, whether denial of respondents' permit application was reasonable in light of the evidence before the City at the time of its decision.<sup>8</sup>

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<sup>8</sup> As we explain in Part C, *infra*, whether land-use regulation reasonably furthers legitimate governmental purposes should be deemed irrelevant to the determination whether a taking has occurred—as distinguished from whether the taking, if one occurred, was for a “public use.” For the reasons stated in this Part, however, the court of appeals' disposition of this case was erroneous even assuming (consistent with the jury instructions given by the district court) that such an inquiry is properly a part of the taking analysis.

1. In a variety of contexts, courts are called upon to assess the rationality of regulatory measures adopted either by the federal government, or by the States or their political subdivisions. Pursuant to the Administrative Procedure Act, a reviewing court may determine whether agency action is “arbitrary [or] capricious,” 5 U.S.C. 706(2)(A), or “unsupported by substantial evidence,” 5 U.S.C. 706(2)(E). In resolving challenges to economic regulation based upon the Due Process Clause of the Fifth or Fourteenth Amendment, a court must ask whether “the legislature has acted in an arbitrary or irrational way.” *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 637 (1993). The court's review under the Equal Protection Clause is similarly deferential: “In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

The hallmark of any form of rationality or reasonableness review is that a legislative or administrative determination may not be overturned simply because the court reweighs the relevant evidence and concludes that a different decision would have been preferable. See, e.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (rule adopted by the National Labor Relations Board may be upheld as rational even if Members of the Court would have preferred a different rule); *Allentown Mack Sales and Serv., Inc. v. NLRB*, 118 S. Ct. 818, 829 (1998) (“substantial evidence” standard “gives the agency the benefit of the doubt, since it requires not the degree of evidence which satisfies the court that the requisite fact exists, but merely the degree that *could* satisfy a



reasonable factfinder"); *INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1 (1992) (to reverse decision agency under substantial evidence test, court "must find that the evidence not only *supports* that conclusion, but *compels* it"); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938) (judicial inquiry in substantive due process challenge "must be restricted to the issue whether any state of facts either known or which reasonably could be assumed affords support for" the legislative judgment, and "neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for" the legislative determination); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation [under the Equal Protection Clause] merely by tendering evidence in court that the legislature was mistaken.").

The court of appeals' analysis cannot be reconciled with those principles. The court held that the jury's verdict in this case could legitimately be based on a decision "to credit [respondents'] experts, and discredit the City's testimony." Pet. App. 18. Under established administrative law principles, however, the existence of conflicting evidence does not entitle the reviewing court to decide for itself on which side the evidence preponderates; its role is limited to determining whether the agency could reasonably have chosen the course that it did. Even assuming that respondents' takings claim was properly submitted to the jury, nothing in the Seventh Amendment or in 42 U.S.C. 1983 gives the jury a more sweeping power than a court might have exercised.<sup>9</sup>

<sup>9</sup> Application of the foregoing principles in this case is complicated somewhat by the fact that the evidence placed before the jury was not limited to the administrative record underlying the City's decision to deny the development permit, but included the testimony of expert wit-

2. The court of appeals' analysis is subject to a second, and related, criticism. Whether a court's review is based upon the APA or upon the Due Process or Equal Protection Clause, the question whether an agency decision is arbitrary, unreasonable, or unsupported by substantial evidence is a question of law subject to *de novo* review. See, e.g., *Athens Community Hosp., Inc. v. Shalala*, 21 F.3d 1176, 1178 (D.C. Cir. 1994) ("Upon the issue whether an administrative regulation is lawful, we do not defer to the judgment of the district court"; rather, the court of appeals "determine[s] *de novo* whether the agency's decision was arbitrary or capricious."); *Novicki v. Cook*, 946 F.2d 938, 941 (D.C. Cir. 1991) ("We do not defer to a district court's review of an agency adjudication any more than the Supreme Court defers to a court of appeals' review of such a decision."); *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996) ("We review the district court[']s decision *de novo* and therefore must independently determine whether the [agency's] decision (1) is free of legal error and (2) is supported by substantial evidence.").

The district court instructed the jury that "[t]he regulatory actions of the city or any agency substantially advance[] a legitimate public purpose if the action bears a reasonable relationship to that objective." Pet. App. 13. If

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nesses introduced by both parties. The fact remains, however, that the question placed before the jury was whether the City's decision bore a reasonable relationship to a legitimate governmental objective. The experts who testified at trial had previously expressed their views to the City Council during the permit application process; the purpose of their testimony was simply to explicate for the jury the nature of the evidence that was before the Council at the time it made its decision. The use of live testimony to supplement the documentary record in that respect did not authorize the jury to reject the City's decision as unreasonable simply because it found the evidence supporting respondents' permit application to be more persuasive than the evidence on the other side.

the district court had itself determined that the permit denial lacked a "reasonable relationship" to the City's environmental concerns, and had ruled in respondents' favor on that basis, its decision would have been subject to de novo review in the court of appeals. There is no logical basis for reviewing a comparable jury verdict under a more deferential standard. The court of appeals, however, sustained the jury's verdict based on its determination that "[s]ignificant evidence supports [respondents'] claim," and that a "rational juror could conclude that the City's denial of [respondents'] application lacked a sufficient nexus with its stated objectives." *Id.* at 20. In so holding, the court of appeals abdicated its responsibility to determine, as a matter of law, whether the City's denial of respondents' permit application satisfied the (deferential) standard embodied in the jury instructions.<sup>10</sup>

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<sup>10</sup> As we explain above, see note 1, *supra*, the United States takes no position on the question whether the liability issues in this case were properly submitted to the jury. We do note, however, that it would be anomalous to submit to a jury a determination of the sort that would be subject to de novo review in the court of appeals. Determinations regarding the reasonableness of decisions made by governmental bodies are, moreover, routinely entrusted to federal judges. (Indeed, the district court in the instant case reserved for itself the question whether the City's denial of respondents' permit application violated principles of substantive due process. See Pet. App. 41-42.) And because such determinations do not properly entail the resolution of credibility disputes or the reweighing of evidence considered by the governmental body whose decision is under review, they do not implicate the traditional strengths of juries. Thus, assuming (contrary to our position, see Part C, *infra*) that takings liability can correctly be premised on a finding that land-use regulation does not reasonably relate to legitimate state interests, the essentially legal character of the reasonableness inquiry, and the greater experience of judges at undertaking such an analysis, would weigh against submission of that issue to a jury. Cf. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996).

**C. A Determination That Land-Use Regulation Fails Substantially To Advance A Legitimate Governmental Interest Does Not Provide A Sufficient Basis For Concluding That A Compensable Taking Of Property Has Occurred**

The jury in the instant case was instructed that respondents could establish a compensable taking if they proved "that the City's decision to reject [respondents'] 190 unit development proposal did not substantially advance a legitimate public purpose." J.A. 303. That instruction is consistent with this Court's statement in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), that

[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n. 36 (1978).

447 U.S. at 260. We believe, however, that the language quoted above may properly be regarded as dictum, and that it is unfounded insofar as it suggests that land-use regulation may be deemed a taking that requires the payment of just compensation if it fails substantially to further a legitimate governmental objective.<sup>11</sup>

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<sup>11</sup> The *Agins* Court's articulation of the governing constitutional standard may properly be characterized as dictum, since the Court concluded that the challenged zoning ordinances *did* "substantially advance legitimate governmental goals." 447 U.S. at 261. The land-owners in *Agins* did not seriously contend that the challenged zoning restriction failed to advance a legitimate state interest. See Br. for Appellants 17 n.5 (No. 79-602) ("that the City of Tiburon may take private property for public use, and that open space is one species of such legislatively declared public use, cannot be the subject of rational debate in the case at bench"). It is also of significance to the issue



1. The *Agins* Court did not identify any basis in the Just Compensation Clause itself, or in that Clause's background or subsequent application, for the statement quoted above. Instead, it simply relied on this Court's statement in *Nectow* that a restriction on private development adopted as part of a municipal zoning plan generally "cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." 277 U.S. at 188 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)). *Nectow*, however, did not involve a claim under the Just Compensation

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discussed in Part B, *supra*, that the Court reached its conclusion on this point solely by reference to the applicable state law and local ordinances, without consideration of factual issues of the sort the jury was allowed to consider in this case.

This Court has quoted the *Agins* passage in some subsequent opinions. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan*, 483 U.S. at 834 & n.3, 841; *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *Dolan*, 512 U.S. at 85. In no case, however, has the Court found a compensable taking based on its conclusion that land-use regulation did not substantially advance a legitimate state interest. Indeed, eight years after this Court's decision in *Agins*, the Claims Court stated that "no court has ever found that a taking has occurred solely because a legitimate state interest was not substantially advanced." *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 390 (1988). We are aware of only one subsequent decision in which a court has entered an award of just compensation on that basis. See *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401, 408-412 (Neb. 1994).

*Nollan* and *Dolan* are not to the contrary. As we explain above (see pp. 11-15, *supra*), both those cases rest on the proposition that compelled dedications of property require a greater justification than do regulatory measures that simply restrict the owner's use of land. Because the analysis articulated in those cases requires a comparison between the compelled dedication and the anticipated effects of proposed development, that test has no application to cases that do not involve a dedication requirement.

Clause. Rather, the plaintiff in that case contended that the zoning regime "deprived him of his property without due process of law in contravention of the Fourteenth Amendment." *Id.* at 185. In setting forth the legal principles governing its review, the *Nectow* Court observed that

a court should not set aside the determination of public officers in such a matter unless it is clear that their action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."

*Id.* at 187-188 (quoting *Euclid*, 272 U.S. at 395).

Thus, the *Nectow* Court's use of the word "substantial" cannot properly be read to suggest that a more stringent means-ends inquiry is appropriate when land-use regulation is challenged under the Just Compensation Clause than when it is alleged to effect a denial of substantive due process. That is so both because *Nectow* did not involve a claim under the Just Compensation Clause, and because the *Nectow* Court used the phrase "substantial relation" in contradistinction to "a mere arbitrary or irrational exercise of power."<sup>12</sup> Because the *Agins* Court's use of the phrase "substantially advance" was supported only by citation to *Nectow*, *Agins* should not be read to have approved a new, and more demanding, standard governing the adjudication of takings claims. Rather, read in its proper context, *Agins* simply suggests that land-use regulation so arbitrary or irrational as to constitute a violation of substantive due process principles may be found, on that

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<sup>12</sup> Compare J.A. 304 (district court instructed the jury in this case that "[t]he regulatory actions of the city or any agency substantially advance[] a legitimate public purpose if the action bears a reasonable relationship to that objective").

basis, to effect a taking of property as well.<sup>13</sup> In our view, however, that suggestion is incorrect.

2. Although the passage in *Agins* quoted above has been repeated in several of this Court's subsequent decisions, it is ultimately irreconcilable with the principles underlying the Court's regulatory takings jurisprudence. As this Court recognized in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992), "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." Rather, until the Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas*, 505 U.S. at 1014 (citations omitted). This Court has since concluded, how-

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<sup>13</sup> Relying on *Agins*'s use of the phrase "substantially advance," the Court in *Nollan* suggested that takings analysis might involve a more searching means-ends inquiry than is properly undertaken pursuant to the Due Process Clause. The Court stated that "there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical." 483 U.S. at 835 n.3. The Court has more recently reiterated, however, that where "due process arguments are unavailing, 'it would be surprising indeed to discover' the challenged statute nonetheless violated the Takings Clause." *Concrete Pipe*, 508 U.S. at 641.

In any event, our argument is not that takings and due process challenges to land-use regulation are governed by "identical" standards. A regulation that deprives the owner of all economically beneficial use of land may constitute a taking even where it satisfies due process review. Our point is simply that where land-use regulation satisfies due process standards, it may not be deemed a taking, requiring the payment of compensation, based on a purportedly insufficient nexus between the governmental interest to be furthered and the means employed to advance that interest.

ever, that even where an owner is not divested of title to or possession of real property, land-use regulation may effect a taking if it trenches too severely upon the prerogatives that have traditionally accompanied ownership. See *id.* at 1014-1019. Thus, regulation that entails a permanent physical occupation of real property, see *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831-832; *Loretto*, 458 U.S. at 426, 434-435, 441, or that deprives the owner of all economically beneficial use of the land, see *Lucas*, 505 U.S. at 1015-1016, typically requires the payment of just compensation even though it does not involve a "direct appropriation" of the property involved.

But while a direct appropriation is not a *sine qua non* of a compensable taking, it remains the point of reference for determining whether there is a taking requiring the payment of compensation. That point of reference is evident in *Mahon* itself, the Court's seminal decision concerning the application of the Just Compensation Clause to regulation of the use of real property. In *Mahon*, the Court explained that "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." 260 U.S. at 414. In *Loretto*, the Court observed that a permanent physical occupation "is perhaps the most serious form of invasion of an owner's property interests," one that "forever denies the owner any power to control the use of the property" that is occupied. 458 U.S. at 435, 436. In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 185 (1985), the Court recognized that "government regulation may be so restrictive that it denies a property owner all reasonable beneficial use of its property, and thus has the same effect as an appropriation of the property for public use." See also *id.* at 199 (in determining whether regulatory measures go "too far," the court's task is "to distinguish the point at which regu-



lation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession"). And the *Lucas* Court noted that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." 505 U.S. at 1017.

The Court's regulatory takings jurisprudence thus reflects a determination that certain forms of land-use regulation are, from the owner's perspective, sufficiently similar to the direct appropriation of property as to trigger the Fifth Amendment requirement that just compensation be paid. By contrast, regulation that involves neither a physical occupation nor a denial of all economically beneficial use, and is objectionable only because it fails to advance a legitimate governmental interest, cannot plausibly be regarded as the functional equivalent of a direct appropriation of land.

3. The purpose of the Just Compensation Clause is not to protect property owners against regulation that serves no legitimate governmental purpose. To the contrary, the Clause by its terms "presupposes that [property] is wanted for public use." *Mahon*, 260 U.S. at 415; see also *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 239-245 (1984).<sup>14</sup> The Just Compensation Clause "does not prohibit

<sup>14</sup> The Court in *Midkiff* reiterated the established rule that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." 467 U.S. at 241 (quoting *Thompson v. Consolidated Gas Util. Corp.*, 300 U.S. 55, 80 (1937)). The Court in *Midkiff* defined the "public use" requirement in a manner that essentially duplicates the standard applicable to substantive due process claims, observing that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." 467 U.S. at 241; see also *id.* at 240 ("The 'public use' requirement is thus coterminous with

the taking of private property, but instead places a condition on the exercise of that power. \* \* \* [I]t is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 314-315 (1987).

Thus, the constitutional requirement that just compensation be paid in order for a taking to be lawful is not intended to prevent or deter the government from adopting irrational regulatory schemes. Rather, the just compensation requirement addresses the quite different concern that the costs of *legitimate* public programs not be concentrated unfairly on discrete individuals. See, e.g., *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (just compensation requirement "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14 (1984).<sup>15</sup> In determining

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the scope of a sovereign's police powers."); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014-1016 & n.18 (1984).

<sup>15</sup> For that reason, the court of appeals erred, in the course of analyzing the jury trial issue, in analogizing eminent domain and inverse condemnation actions to suits based on trespass or conversion. See Pet. App. 9. Those actions sound in *tort*, and any resulting money judgment takes the form of damages to compensate for injury sustained as the result of wrongful conduct. The Federal Tort Claims Act specifically exempts the United States from monetary liability under that Act based on "the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. 2680(a). As the Court explained in *United States v. Varig Airlines*, 467 U.S. 797 (1984), that provision was adopted because "[i]t is neither desirable nor intended that the constitutionality of legislation [or] the legality of regulations \* \* \* should be tested through the medium of a damage suit for tort." *Id.* at 809-810 (citation omitted).

whether particular regulatory measures effect a taking of property, this Court has accordingly looked principally to the nature of the burden placed upon individual landowners. Where the burden is functionally comparable to that attendant upon a direct appropriation of property, the Court has held that just compensation is required in order for the regulation to be lawful. See pp. 24-26, *supra*. By contrast, a claim that government regulation fails substantially to advance legitimate state interests has no logical relevance to the question whether the burdens of that regulation have been unfairly concentrated on particular individuals.

4. For the foregoing reasons, land-use regulation that bears no reasonable relationship to any valid governmental purpose violates principles of substantive due process, but it cannot be said (on that basis alone) to effect a compensable taking of property. The significant practical consequences of that distinction result from this Court's decision in *First English*, which recognizes a right to

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The money judgment in an eminent domain or inverse condemnation action, by contrast, is the payment of the compensation that satisfies the condition necessary to render the governmental action lawful. In other words, the payment of compensation results in a lawful transaction in which money is paid in exchange for the government's acquisition of a property interest. An inverse condemnation action therefore is brought to obtain the compensation owed when the legislature is deemed to have authorized the taking of property with compensation to be paid in a judicial proceeding instituted by the property owner (such as in a suit under the Tucker Act, 28 U.S.C. 1491(a)(1)), rather than to have the governmental action enjoined as unauthorized if it is found to constitute a taking that requires the payment of compensation to be lawful. See, e.g., *Ruckelshaus v. Monsanto*, 467 U.S. at 1016-1019. An inverse condemnation action has historically sounded in contract, not tort, with the obligation to pay in exchange for the acquisition of property implied under the terms of the Fifth Amendment. See, e.g., *Jacobs v. United States*, 290 U.S. 13, 16 (1933); compare *Schillinger v. United States*, 155 U.S. 163, 167-168 (1894).

compensation for temporary takings in the regulatory context. 482 U.S. at 318-321. With respect to "the relatively rare situations where the government has deprived a landowner of all economically beneficial uses," *Lucas*, 505 U.S. at 1018, the obligation to provide compensation for temporary takings is a fairly manageable one. The potential liability of the federal and state governments will be substantially increased, however, if a finding that land-use restrictions are not reasonably related to a legitimate governmental interest is deemed sufficient, by itself, to trigger the temporary takings principle while the restrictions were in effect.<sup>16</sup> Such a rule would effectively compel the payment of money damages whenever a court holds government land-use regulation to be irrational, even if the economic loss to the owner is slight in comparison to the property's remaining permissible uses. Nothing in the text or purposes of the Just Compensation Clause supports that result.<sup>17</sup>

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<sup>16</sup> The question whether irrational land-use regulation effects a taking is likely, as a general matter, to be of greater practical significance to federal and state governments than to municipalities such as the petitioner in this case. A local government is a "person" subject to suit for damages under 42 U.S.C. 1983. See, e.g., *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658 (1978). Where municipal policy-making officials restrict the use of land in a manner that violates the owner's substantive due process rights, monetary relief will therefore be available, regardless of whether the restriction is also deemed a "taking" within the meaning of the Just Compensation Clause. A State, by contrast, is not a "person" subject to suit under Section 1983, see *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 62-71 (1989), and there is no federal statute generally authorizing suits for damages against the United States in cases involving constitutional violations.

<sup>17</sup> This Court's decision in *First English* cannot plausibly be construed as establishing any overarching principle that retrospective monetary relief must always be made available for losses suffered as a result of unconstitutional government conduct. The Court has recognized, for example, that "[t]he rule that the United States may



**CONCLUSION**

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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not be sued without its consent is all embracing," *Lynch v. United States*, 292 U.S. 571, 581 (1934), and applies to suits "arising from some violation of rights conferred upon the citizen by the Constitution," *id.* at 582. See also, *e.g.*, *FDIC v. Meyer*, 510 U.S. 471, 484-486 (1994); *United States v. Hopkins*, 427 U.S. 123, 128 (1976). Even where sovereign entities are not entirely immune from suit, the remedy provided upon proof of a constitutional violation is often limited to prospective injunctive relief. See, *e.g.*, *Papasan v. Allain*, 478 U.S. 265, 278 (1986) (Eleventh Amendment bars federal court from awarding relief against state officials that "is tantamount to an award of damages for a past violation of federal law," but does not preclude "relief that serves directly to bring an end to a present violation of federal law"); 5 U.S.C. 702 (APA authorizes suits against federal agencies for "relief other than money damages").

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No. 97-1235

Supreme Court, U. S.

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CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1997

CITY OF MONTEREY,

*Petitioner,*

v.

DEL MONTE DUNES AT MONTEREY LIMITED, *et al.*,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF  
LEAGUE FOR COASTAL PROTECTION,  
PLANNING AND CONSERVATION LEAGUE,  
CENTER FOR MARINE CONSERVATION,  
CHESAPEAKE BAY FOUNDATION,  
NATIONAL TRUST FOR HISTORIC PRESERVATION,  
NATIONAL WILDLIFE FEDERATION, AND SIERRA CLUB  
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## STATEMENT OF INTEREST

The *amici curiae* — League for Coastal Protection, Planning and Conservation League, Center for Marine Conservation, Chesapeake Bay Foundation, National Trust for Historic Preservation, National Wildlife Federation, and Sierra Club — are organizations dedicated to the wise use and conservation of natural and cultural resources and therefore support reasonable government regulation of land use to protect the public interest.\* The *amici* have a substantial interest in this case because the court of appeals adopted a standard for identifying a taking under the Takings Clause which contradicts the language and original understanding of the Clause, is inconsistent with the principles established by the Court's prior takings decisions, and would impose new financial liabilities on governments at all levels. This expansion of liability under the Takings Clause would not only increase the financial burdens on taxpayers, but also would undermine the ability of democratically elected officials to resolve important, complex issues in as fair and balanced a fashion as possible.

This *amicus* brief focuses on two issues: First, whether the court of appeals erred by attempting to defend the judgment by relying on the Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Second, whether the court of appeals erred by concluding that an analysis of whether the City's action furthered a legitimate government purpose was relevant, not simply to the due process claim in this case, but

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\* Counsel for the parties have consented to the filing of this *amicus* brief, and the letters of consent are being filed with the Clerk simultaneously with the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, made a monetary contribution to this brief's preparation or submission. See Supreme Court Rule. 37.



to the claim that the City effected a compensable taking under the Fifth Amendment.

### SUMMARY OF ARGUMENT

The court of appeals erred by relying on *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which is irrelevant to this case. *Dolan* establishes a special test for reviewing physical invasions of private property effected through permit conditions attached to discretionary permits. This case, on the other hand, involves a takings challenge to a city's restrictions on permissible land uses.

The court of appeals also erred by concluding that an evaluation of whether a government action furthers a legitimate public purpose provides an appropriate test for determining whether a government restriction on land use effects a compensable taking. Including a means-ends test as a general component of takings analysis would conflict with the language of the Takings Clause, the original understanding of the Clause, basic principles supporting the Court's takings jurisprudence, and several of the Court's leading takings precedents. While the Court has stated on several occasions that a government action "effects a taking" if it "does not substantially advance legitimate state interests," *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), the Court has never applied that test to find that ordinary land use restrictions effect a taking. The *Agins* standard supports and is logically related to the test developed in *Dolan* and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) for reviewing physical invasions. But the Court should reject the position that means-ends analysis provides an independent basis for determining whether a land use restriction effects a taking under the Takings Clause.

### ARGUMENT

#### I. *Dolan* Is Irrelevant to this Case Because the *Dolan* Standard is Limited to Regulatory Conditions Effecting a Permanent Physical Invasion of Property, and the Land Use Regulation in This Case Did Not Effect a Permanent Physical Invasion.

The court of appeals erred by relying on the Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in affirming the district court's denial of the City's motion for judgment n.o.v. In fact, the jury was not given any instructions which reflected this decision, which was not even decided until after the jury entered its verdict. In any event, the court of appeals was wrong to conclude that *Dolan* provides an appropriate legal standard for determining whether a limitation on the use of property, as opposed to a regulation authorizing a physical invasion of private property, effects a compensable taking.

*Dolan*, and the Court's earlier decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), addressed regulatory permit conditions which effect a permanent physical invasion of private property, and they establish a special standard which is explained and justified by, and logically confined to, that narrow context. In both cases, the government imposed a condition requiring the owner to grant public access to the property. Standing alone, these requirements indisputably would have effected a taking requiring payment of just compensation. *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831. See generally *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). The issue the Court faced in those cases was whether a taking could be avoided because the requirements, rather than being imposed as free-standing mandates, were attached

as conditions to discretionary permits which the government had no constitutional obligation to grant.

The Court held that a finding of a taking could be avoided, provided that the conditions were sufficiently closely related to the legitimate purposes of the regulatory process itself. More specifically, the Court ruled that attaching otherwise unconstitutional conditions to regulatory permits would *not* effect a taking if: (1) there was an essential "nexus" between the conditions and the government's regulatory purposes, *Nollan*, 483 U.S. at 837, and (2) there was a "rough proportionality" between what the owner surrendered and the impacts of the proposed development, *Dolan*, 512 U.S. at 391. Thus, *Nollan* and *Dolan* established a special standard of takings analysis to address a special situation. This standard does not apply to traditional regulatory programs which do not involve conditions effecting physical invasions, *Dolan*, 512 U.S. at 385; *Nollan*, 483 U.S. at 831, and which therefore are entitled to the usual deference accorded local land use decision-making.

Consistent with the holdings and reasoning in *Dolan* and *Nollan*, lower federal and state appellate courts have almost uniformly read these decisions as being limited to the physical exactions context. See, e.g., *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1088 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 2514 (1997) (*Dolan* and *Nollan* irrelevant to takings challenge where zoning ordinance "told [the owner] how it could use the property. . . , but did nothing to require [the owner] to open its property to the public for use just as the public wished"); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578-79 (10th Cir. 1995) ("*Nollan* and *Dolan* are best understood as extending the analysis of complete physical occupation cases to those situations in which the government achieves the same end (i.e., the possession of one's physical property) through a conditional permitting procedure");

*McCarthy v. City of Leawood*, 894 P.2d 836 (Kan. 1995) (*Dolan* applies only to regulations involving dedications of land). Indeed, even within the Ninth Circuit itself, the court of appeals' decision is apparently aberrational. See *Commercial Builders v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992) ("no decisions have interpreted [*Nollan*] as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land"); *Garneau v. City of Seattle*, 1998 WL 214579 (9th Cir. 1998) (*Dolan* analysis rests on condition which effects *per se* physical occupation taking).

Here, in contrast to *Dolan*, the government action *does* involve, in the Court's words, "simply a limitation on the use" respond[ent] could make of the property, *Dolan*, 512 U.S. at 385, and not a condition effecting a physical occupation of property. Therefore, *Dolan* (and *Nollan*) do not apply in this case. The Court should vacate the decision of the court of appeals for reconsideration of the City's appeal based on a proper legal standard.<sup>1</sup>

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<sup>1</sup> Apart from the fact that the holdings and logic of *Dolan* and *Nollan* do not apply in this case, it also is impossible as a practical matter, as the court of appeals' somewhat tortured analysis illustrates, to apply the "essential nexus" and "rough proportionality" standards developed in those cases to this type of regulatory action. The "nexus" test first announced in *Nollan* focuses on whether a condition serves the same objective as would an outright regulatory denial; the "rough proportionality" test focuses on whether the extent of a condition is proportional to the impacts of development mitigated by the imposition of the condition. Both of these tests represent meaningful judicial standards in the context of exaction conditions. On the other hand, these tests cannot sensibly be applied in a case involving the outright denial of a regulatory permit, which would include no conditions for a court to analyze.



**II. Whether a Regulation Furthers a Legitimate Government Purpose Raises a Threshold Issue About the Regulation's Validity, Not an Issue Dispositive of Whether the Regulation Effects a Taking Requiring Payment of Just Compensation.**

The court of appeals incorrectly concluded that an evaluation of the legitimacy of governmental ends, and the reasonableness of the means selected to achieve those ends, represents an independent test for all government regulation in the land use area under the Takings Clause. This legal error represents a second basis for reversing the decision of the court of appeals.

The district court's instructions, which the court of appeals ratified, laid out this purported means-ends test at some length. The trial court first instructed the jury that "one of your jobs as jurors is to decide if the city's decision here substantially advanced . . . [a] legitimate public purpose." 93 F.3d at 1429. The district court then instructed that "[t]he regulatory actions of the city or any agency substantially advance[ ] a legitimate public purpose if the action bears a reasonable relationship to that objective." *Id.* Finally, the court framed the ultimate question for the jury as follows: "[I]f the preponderance of the evidence establishes that there was no reasonable relationship between the city's denial of the . . . proposal and [a] legitimate public purpose, you should find in favor of the plaintiff. If you find that there existed a reasonable relationship between the city's decision and a legitimate public purpose, you should find in favor of the city." *Id.*

While the district court's instructions offered varying formulations of this purported standard, it is nonetheless clear that these instructions framed an incorrect test for determining whether a government action effects a compensable taking.

To be sure, the Court has, on various occasions, suggested that means-ends analysis plays a role in takings analysis. Specifically, the Court has stated that a government action "effects a taking" if it "does not substantially advance legitimate state interests." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987) (citing *Agins*). However, the Court has never applied this standard to find a taking in a case such as this involving regulations limiting the permissible uses of property. The *Agins* standard supports and is logically related to the test the Court developed in *Nollan* and *Dolan* for evaluating under the Takings Clause conditions effecting a physical invasion. But, as explained below, the Court should not extend the *Agins* standard beyond that specialized context to circumstances where it has no logical role.

The claim that a government action fails to advance — whether "substantially" or "reasonably" — a legitimate government purpose does potentially raise a viable constitutional issue. But it does not represent a viable claim of a compensable taking under the Takings Clause. It represents a potential due process violation.<sup>2</sup>

Section A below discusses why means-ends analysis in a takings compensation case would conflict with the language

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<sup>2</sup> The trial court rejected the due process claim in this case and the respondent did not appeal the resolution of that issue. That the means-ends takings claim prevailed at trial simply reflects the fact that the court resolved the mean-ends issue under the due process label and a jury was (erroneously) assigned the task of resolving the same issue again under the takings label, as well as the fact that the court of appeals (erroneously) believed that the jury was not required to accord any deference whatsoever to the conclusions and reasoning of the City.

of the Takings Clause, the original understanding of the Clause, the basic principles the Court has identified as underlying takings doctrine, and several of the Court's leading takings precedents. Section B discusses the *Agins* "substantially advance" standard and explains why this standard should not be read to provide a test for identifying compensable takings resulting from ordinary land use regulations.

**A. Means-Ends Analysis Is Not a Proper Component of the Inquiry Whether A Land Use Restriction Effects a Compensable Taking.**

*Plain Language.* A government action which fails to advance a legitimate government purpose cannot, on that basis, be found to effect a compensable taking for the simple reason that such an action is not a taking "for public use" within the plain meaning of the Takings Clause. Indeed, the claim that a government action fails to serve a legitimate public purpose contradicts the requirement for a lawful taking that the action must serve a "public use." Rather than providing a basis for a taking claim, a government action that does not serve a public use is already invalid under the Due Process Clause.

This reading of the Takings Clause also is supported by the important differences in language between the Takings Clause and the Due Process Clause. The Takings Clause in the Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation," while the Due Process Clause in the Fifth and Fourteenth Amendments, states that no person shall be "deprived" of "property, without due process of law." Given the difference in language, the same means-ends claim which states a cause of action under the Due Process Clause cannot logically state a cause of action

under the quite different language of the Takings Clause. See *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) ("When two parts of a [constitutional amendment] use different language to address the same or similar subject matter, a difference in meaning is assumed.").

*Original Understanding.* The application of a means-ends test under the Takings Clause also conflicts with the original understanding of the Clause. The Takings Clause was originally intended to address direct appropriations of private property. See *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1014 (prior to the early 20th century, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property . . . , or the functional equivalent of a 'practical ouster of [the owner's] possession.'"); see also John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Columbia L. Rev. 782 (1995). In deference to the original understanding of the Takings Clause, the Court has confined the Clause in the area of land use regulation to those "extreme circumstances" where regulations impose severe economic burdens analogous to direct physical appropriations. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). See *Lucas v. South Carolina Coastal Council*, *supra*; *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

Application of the means-ends test, by contrast, would extend the Takings Clause to circumstances where regulations may have little or no adverse economic impact and bear no similarity to the type of direct appropriations at the heart of takings doctrine. Compare *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994) (rejecting means-ends takings test because it would



have supported claims for financial compensation when economic injury was only nominal). This reading of the Takings Clause would unhinge the Court's takings jurisprudence from any plausible connection to the original understanding of the Takings Clause. The conclusion that the Takings Clause encompasses a means-end inquiry cannot be squared with the limited role of the judicial branch in interpreting and enforcing the Constitution.<sup>3</sup>

*Basic Takings Principles.* The means-ends test also conflicts with several general principles which the Court has identified as supporting the Court's takings jurisprudence. First, the Takings Clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). If a regulation advances a legitimate public purpose, "it is axiomatic that the public receives a benefit while the offending regulation is in effect." *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting). The Court has ruled, under that

<sup>3</sup> In keeping with the traditional view that a regulatory taking must be closely akin to a direct physical occupation, the Court in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), stated that when a regulation is found to effect a taking, "the government retains the whole range of options already available — amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." *Id.* at 321. Exercise of eminent domain is a logical option in the case of a regulation, as in *First English*, which allegedly denies the owner "all use" of the property. *Id.* at 308. But an exercise of the power of eminent domain makes no sense in response to a determination that a regulation fails to advance a legitimate governmental purpose, because the government would not be legally authorized to take the property. The *First English* Court obviously did not conceive that a taking could be established by demonstrating that the government action was invalid. See p.12, *infra*.

circumstance, that it is "fair" for the public to pay just compensation. On the other hand, the claim that a government action *fails* to advance a legitimate public purpose demonstrates *no* public benefit for which the public can fairly be asked to pay.

This conclusion also is consistent with the principle that the Takings Clause is not a substantive limitation on government power, but simply a condition on the exercise of government power. As the Court has frequently stated, the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987). See also *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984). "The protection of private property in the Fifth Amendment *presupposes* that it is wanted for public use, but provides that it shall not be taken for such use without just compensation." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (emphasis added). Accordingly, in *Mahon*, for example, the Court did not closely examine whether the Kohler Act reasonably implemented legitimate public purposes, but simply "assume[d] . . . that the statute was passed upon the conviction that an exigency existed that would warrant it." *Id.* at 416. "[T]he question at bottom" under the Takings Clause, the Court continued, "is upon whom the loss of the changes desired should fall." *Id.*

*Leading Precedents.* The means-ends test also conflicts with the holdings and reasoning of some of the Court's leading takings precedents. In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), a challenge to the legitimacy of an exercise of the power of eminent domain accompanied by payment of compensation, the Court held that the Takings Clause prohibits a taking not for a "public use," whether just

compensation is paid or not. Resolution of the issue whether a government action meets the "public use" requirement depends upon whether "the legislature's purpose is legitimate," and whether "its means are not irrational," *id.* at 242-43. This is the same standard that the Court uses to determine whether an action is valid under the Due Process Clause. See *id.* at 241, discussing *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403, 416 (1896), and *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937) (both due process cases).

Thus, under *Midkiff*, a means-ends analysis determines whether or not a government action is within the scope of governmental authority to begin with, regardless of whether compensation is paid. The same analysis logically cannot provide the test for determining whether a government action demands compensation pursuant to the Takings Clause. Indeed, the test applied by the court of appeals would turn *Midkiff* on its head. See Jan G. Laitos, *The Public Use Paradox and the Takings Clause*, 13 J. Energy Nat. Res. & Envtl. L. 9, 33 (1993) (discussing conflict between purported means-ends takings test and *Midkiff*). See also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 511 (1987) (Rehnquist, C.J. dissenting) (fact that regulation serves public purpose "does not resolve the question whether a taking has occurred; the existence of such a public purpose is merely a *necessary prerequisite* to the government's exercise of its taking power") (emphasis added).

The means-ends test under the Takings Clause also would conflict with the Court's decision in *First English*. As Chief Justice Rehnquist explained in that case, the Takings Clause "is designed . . . to secure *compensation* in the event of *otherwise proper* interference amounting to a taking." 482 U.S. at 315 (second emphasis added). See also *Preseault v. ICC*, 494 U.S. 1, 11 (1990) (quoting *First English*). A

government action which fails to advance a legitimate government interest does not result in a compensable taking because it is not an "otherwise proper" government action. A regulation which is "improper" in the nominal sense that it effects a taking without providing just compensation is, of course, subject to challenge under the Takings Clause. However, according to *First English*, the Takings Clause does not provide just compensation unless the challenged action is "otherwise proper," that is, not unlawful on some *other* basis, such as the Due Process Clause.

Of course, the Court's decision in *First English* definitively disposed of the argument that regulations which eliminate a property's economic value can never effect a compensable taking and instead represent only invalid exercises of government power under the Due Process Clause. See *First English*, 482 U.S. at 314; see also *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 649 n.14 (1981) (Brennan, J., dissenting) (discussed with approval in *First English*). At the same time, the *First English* decision provides no support for the quite different position, which the Court has *never* embraced, that a regulation which violates the Due Process Clause *necessarily* results in a taking requiring the payment of just compensation. The Court's statement in *First English* that recovery of just compensation is limited to government actions which are "otherwise proper" refutes this position.

Indeed, even Justice Brennan, who championed the view that the Takings Clause mandates compensation for regulatory takings, distinguished a claim that a valid government action effects a compensable taking from the "different case . . . where a police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare so that there may be no 'public use.'" See *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. at 656 n.23. Speaking



for himself and three other Justices, Justice Brennan observed, "the government entity may not be forced [in that case] to pay just compensation under the Fifth Amendment," but the landowner might "nevertheless have a damage cause of action under 42 U.S.C. § 1983 for a Fourteenth Amendment due process violation." *Id.* Significantly, none of the Justices in the majority, which concluded that the case had to be dismissed for want of a final judgment, disputed Justice Brennan's view that regulations which do not further a legitimate public purpose cannot be compensable takings under the Takings Clause. *See San Diego*, 450 U.S. at 632-33 (Rehnquist, J., concurring) (stating that he "would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan").

**B. *Agins* Should Not Be Read to Support the Conclusion that Means-Ends Analysis Is a Free-standing Test for Determining Whether a Restriction on Land Use Effects a Taking.**

As stated above, the Court has on various occasions stated that a regulation "effects a taking" if it "does not substantially advance legitimate state interests." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). However, the Court has never applied this standard to find a taking as a result of regulation limiting the permissible uses of land. *Agins*, which is most often cited as the origin of this purported test, does not support the conclusion that, in general, a compensable taking occurs when a government action fails to meet this means-ends standard. While the Court relied on the *Agins* standard to justify and explain the "essential nexus" test developed in *Nollan*, neither *Nollan* nor the Court's subsequent decision in *Dolan* supports applying the *Agins* standard outside of the physical invasion context.

Understood in historical context, the means-ends test in *Agins*, a brief, unanimous decision upholding a zoning ordinance, simply repeated the familiar principle that a regulation which fails to advance a legitimate governmental interest violates the Due Process Clause. The *Agins* opinion is best understood as referring to a government action which amounts to a due process violation and is therefore invalid, rather than to a government action which effects a taking requiring the payment of just compensation under the Takings Clause. Prior to *First English*, the distinction between "takings" and "due process" violations was far less clear than it is today. Indeed, as discussed above, there was debate at the time over whether regulations which "took" private property by eliminating its economic value effected a taking under the Takings Clause at all, or simply represented a due process violation. *See, e.g., Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 384-86 (N.Y.), *cert. denied and appeal dismissed*, 429 U.S. 990 (1976) (concluding that the word 'taking' was used in *Mahon* 'metaphorically,' and that the "gravamen of the constitutional challenge to the regulatory measure was that it was an invalid exercise of the police power under the due process clause, and the [case was] decided under that rubric"). *See also Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 197-200 (1985) (discussing due process theory at length).

Indeed, prior to the Court's clarification of the distinct character of the constitutional protection afforded by the Takings Clause, the Court frequently used the term "taking" to refer to a due process violation as well. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 244 (1964) (addressing allegations that government action effected a "taking . . . of property without due process of law, and a taking of . . . property without just compensation"); *Oyama*

*v. California*, 332 U.S. 633, 635-36 (1948) (addressing claim that escheat action "takes property without due process of law"); *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403, 416 (1896) (invalidating under the Due Process Clause a "taking" of private property, when the "order in question was not, and was not claimed to be, . . . a taking of private property for public use under the right of eminent domain"). The *Agins* Court's use of the term "taking" to refer to what was a due process issue was therefore consistent with longstanding Court practice, and did not establish a new, independent test under the Takings Clause.

That the *Agins* Court was referring to a due process violation is confirmed by the precedent upon which the Court relied to support this statement, *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). See *Agins*, 447 U.S. at 260. *Nectow* involved a constitutional challenge to a zoning regulation in which the owner alleged that the restriction did "not bear a substantial relation to the public health, safety, morals, or general welfare." *Id.* at 188. As the Court's opinion in *Nectow* made abundantly clear, *Nectow* did *not* arise under the Takings Clause, but rather involved a claim that the ordinance "deprived [the owner] of his property without due process of law in contravention of the Fourteenth Amendment." *Nectow*, 277 U.S. at 183. Moreover, the page in the *Nectow* opinion to which *Agins* refers quotes from *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), another land use due process case. See also 447 U.S. at 261. Thus, the Court's language in *Agins* clearly referred to a due process claim, not a takings claim. See Jerold Kayden, *Land Use Regulations, Rationality, and Judicial Review: The RSVP in the Nollan Invitation*, 23 *Urban Lawyer* 301, 314-16 (1991); Kenneth Bley, *Substantive Due Process and Land Use: The Alternative to a Takings Claim*, in *Takings: Land-Development Conditions and Regulatory Takings After Dolan and Lucas* 289, 291

(1996) ("the authority for the first prong of the *Agins* takings test was no authority at all; it was a case based solely on the due process clause").

The Court also used somewhat similar language in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978) — "a use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose" — which, it has been suggested, also supports the notion of a general means-ends test under the Takings Clause. However, again, it is apparent from the context that the Court in *Penn Central* was simply restating the due process standard. The authorities upon which the Court relied to support this proposition included the *Nectow* due process decision, and *Goldblatt v. Hempstead*, 396 U.S. 590 (1962). While *Goldblatt* involved claims under both the Takings and the Due Process Clauses, *Penn Central*'s reference to a means-ends standard draws upon *Goldblatt*'s discussion of the due process claim in that case.

The Court's different linguistic formulations — "substantially advance" (*Agins*), and "reasonably necessary to the effectuation of a substantial government purpose" (*Penn Central*) — could be read to articulate a means-ends standard under the Takings Clause which is somehow more demanding of government, and therefore distinct from traditional rational basis review under the Due Process Clause. However, for several different reasons, this potential argument must be rejected.

First, while the Court's verbal formulations have indeed varied, it is nonetheless clear from the Court's citations to *Nectow*, *Euclid*, and *Goldblatt* that the test in *Agins* (and in *Penn Central*) was derived from and simply restated the traditional due process test of an earlier era. It would be illogical to conclude that takings doctrine incorporates a



general means-ends standard that is similar to but more demanding than means-ends analysis under the Due Process Clause, when even a cursory reading of the Court's decisions shows that all of these formulations have a common origin in the Due Process Clause. Moreover, such an argument would produce the anomalous result that, if government acts rationally, but *no more than rationally*, to advance a legitimate state interest, it effects a taking, but if government acts less than rationally, there is no taking because the government action would fail the "public use" requirement of the Takings Clause.

Second, there is no plausible basis for believing that the Takings Clause independently supports some type of means-ends analysis, much less a type of means-ends analysis that would be more rigorous than means-ends scrutiny under the Due Process Clause. Certainly, this position gains no discernible support from the language of the Takings Clause, and it is refuted by the original understanding that the Takings Clause was intended to focus on direct appropriations imposing extreme economic burdens on individual owners.

While *dictum* in *Nollan* may be read to support a contrary view, *Nollan*, 483 U.S. at 834 n. 3, neither *Nollan*, nor the Court's later decision in *Dolan*, should be read to establish that the Takings Clause incorporates a means-ends test applicable to all governmental decision-making in the land use area. As discussed in section I, those cases involved physical invasions of private property. The decisions addressed whether and under what circumstances such impositions could be inoculated from a finding of a taking based on the fact that the invasions were imposed as a condition attached to discretionary permits. The Court concluded that a condition effecting a physical invasion will not be deemed a taking if an "essential nexus" exists and if the standard of "rough proportionality" is satisfied. This test is obviously similar to

(but not the same as) the *Agins* formulation of the traditional due process means-ends analysis. Thus, it was entirely natural that the Court in *Nollan* referenced the means-ends language from its earlier *Agins* opinion in framing the "essential nexus" test. See 483 U.S. at 834.

But the *Nollan/Dolan* inquiry does not extend to a claim under the Takings Clause based on a government action not effecting a physical invasion of private property. As the Court has noted time and time again, physical invasions authorized by regulation remove an essential right of ownership and thus should be scrutinized with the greatest care to assure that such measures are not an indirect method for taking private property without paying just compensation. *Nollan* and *Dolan* do not stand for the proposition that special scrutiny would be appropriate when reviewing all regulations in the land use area. Given the specialized context in which they apply, *Nollan* and *Dolan* do not establish that the language in *Agins* represents a general test for evaluating regulatory takings claims.<sup>4</sup>

The Court's decision in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), decided one year after the Court's decision in *Nollan*, also supports the conclusion that *Agins* does not provide an independent test for all government regulations in the land use area. In a 6-2 decision involving a rent control law, the Court concluded that it would be premature to consider "any takings claim, because there was no evidence that the tenant hardship provision had ever been applied and

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<sup>4</sup> It also is noteworthy that both *Dolan* and *Nollan* apparently involved claims seeking injunctive relief, which is ordinarily viewed as an appropriate form of relief for a due process violation, but not for an alleged taking. See *First English*, 482 U.S. at 314 (the Takings Clause "does not prohibit the taking of private property, but instead places a [compensation] condition on the exercise of that power").

hearing officers in any event did not have to reduce proposed rents." *Id.* at 9-10. The dissent, relying on *Agins*, argued that the plaintiff's basic contention — that "providing financial assistance to impecunious renters is not a state interest that can be legitimately furthered by regulating the use of property" — did not depend on how the law was actually applied, and therefore the claim was ripe for adjudication. *Id.* at 18-19. The majority's rejection of this argument necessarily presupposed that the *Agins* means-ends language did not provide a general test for determining whether land use regulations effect a taking.

Not surprisingly, the overwhelming majority of lower federal and state courts that have addressed the issue has rejected the suggestion that the *Agins* language can sensibly be read to establish a free-standing test for a compensable taking. The federal courts with specialized jurisdiction to hear claims under the Takings Clause, in particular, have been absolutely clear on this point. Eight years after the Court's *Agins* decision, Chief Judge Loren Smith of the U.S. Court of Federal Claims rejected the suggestion that means-ends scrutiny provided an independent basis for finding a taking, stating that "no court has ever found a taking has occurred solely because a legitimate state interest was not substantially advanced." *Loveladies Harbor v. United States*, 15 Cl. Ct. 381, 390 (1988), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994) (emphasis added). So far as we aware, no subsequent decision of the Court of Federal Claims or the Court of Appeals for the Federal Circuit has held that a compensable taking can be established on this basis.

Likewise, the overwhelming majority of state courts has rejected the suggestion that the *Agins* language creates a free-standing takings test. For example, last year the Rhode Island Supreme Court, in *Brunelle v. Town of South Kingston*, 700 A.2d 1075, 1083 (R.I. 1997), explicitly overruled the trial

court's erroneous conclusion that "a regulatory taking can be compensable if the ordinance in question does not substantially advance any legitimate state interest," stating that "a discussion of the arbitrariness or capriciousness of a particular state action is properly examined under the light of the Fourteenth Amendment due process clause and not the Fifth Amendment takings clause." See also *Mission Springs, Inc. v. Feature Realty, Inc.*, 1998 WL 195977 (Wash. 1998) (city's allegedly "arbitrary" and "illegal" denial of permit stated a claim under the due process clause, not the takings clause); *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 60 So. 2d 541 (Fla. 1994) (rejecting prior court of appeals decision which relied on *Agins*); *cf. Steinbergh v. City of Cambridge*, 604 N.E.2d 1269, 1276 n.10 (Mass. 1992) (reciting *Agins* language as independent takings test, but nonetheless concluding that illegality of government action, standing alone, does not demonstrate a compensable taking).

### CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the U.S. Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

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No. 97-1235

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1997

CITY OF MONTEREY,  
v. *Petitioner,*

DEL MONTE DUNES AT MONTEREY, LTD. AND  
MONTEREY-DEL MONTE DUNES CORPORATION,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

**BRIEF FOR THE  
AMERICAN PLANNING ASSOCIATION  
AS AMICUS CURIAE  
IN SUPPORT OF PETITIONER**

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**QUESTION PRESENTED**

“Can the reasonable proportionality standard established by *Dolan v. Tigard*, 512 U.S. 374 (1994), in the context of property exactions properly be applied to an inverse condemnation claim based upon regulatory denial?”



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IN THE  
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BRIEF FOR THE  
AMERICAN PLANNING ASSOCIATION  
AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Planning Association (APA) is a private nonprofit educational research organization incorporated in the District of Columbia. The APA's purposes and objectives include the advancement of physical, economic, and social planning at local, state, and national levels. APA is the oldest and largest organization in the United States devoted to fostering liveable communities through effective comprehensive planning. The 30,000 members belonging to APA work in local government, federal and state agencies, private consulting firms, and universities. The APA has forty-six chapters representing all fifty states, including a California chapter. More than 4,200



of APA's members reside in California. Members of APA are routinely involved in comprehensive planning and its implementation with regulations dealing with land-use related resources.

Since the 1980's, the APA Board of Directors and its Delegate Assembly composed of State Chapter Presidents have periodically adopted policy guides on matters of national importance to planning and the planning profession. In 1995, APA adopted a policy guide on constitutional takings challenges in the context of land-use regulations designed to implement comprehensive plans. In this policy guide, APA supports the evolving takings law in this country that clearly balances protecting the public health, safety and welfare with protecting property rights. A major concern of APA, however, expressed in the policy guide is that placing this balance at risk by expanding constitutional takings law can impose severe penalties on the majority of our nation's citizens.

### INTRODUCTION

All Parties have provided written consent regarding the American Planning Association's<sup>1</sup> filing of this *amicus curiae* brief. This *Amicus Curiae* Brief is confined to the following question certified by this Court in accepting the petition for *certiorari*:<sup>2</sup>

(3) "Can the reasonable proportionality standard established by *Dolan v. City of Tigard*, 512 U.S. 374 (1994) in the context of property exactions properly be

<sup>1</sup> The American Planning Association and its counsel authored this *amicus curiae* brief. None of the parties, nor any other entity, contributed in any way to this brief. In addition, the American Planning Association, alone, made the monetary contributions necessary for the preparation and submission of the brief. This information is provided in accordance with Supreme Court Rule 37.6.

<sup>2</sup> *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *cert. granted*, 66 U.S.L.W. 3509 (U.S. March 30, 1998) (No. 92-212).

applied to an inverse condemnation action based upon regulatory denial?"

The American Planning Association firmly believes that the answer is "No."

### SUMMARY OF ARGUMENT

Three types of "regulatory takings" claims have been recognized by this Court: (1) a *physical* invasion (*Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982)); (2) a *title* dedication or *exaction* claim in which a property owner is compelled as a condition of development approval to convey specific property or title (*Dolan v. City of Tigard*, 512 U.S. 374 (1994)); and (3) a general *economic* taking in which regulation restricts all or substantially all of the use of property. Robert H. Freilich and Elizabeth A. Garvin, *Takings After Lucas: Growth Management, Planning and Regulatory Implementation Will Work Better Than Before*, 22 Stetson L. Rev. 409, 411 (1993).

*Economic* takings, as distinguished from *physical* or *title* takes, constitute the vast majority of inverse condemnation claims based on regulatory takings and the rule adopted by this Court in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), stating that a land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land," *id.* at 260, is the *general rule* governing all regulatory takings and is based upon the *rational basis test*. The higher scrutiny test, rough proportionality, applies only to the narrow categorical exceptions spelled out in physical and title takes.

Since *Dolan*, state courts have applied the rough proportionality test solely to title dedications or exactions. *See, e.g., Sparks v. Douglas County*, 904 P.2d 738, 745-46 (Wash. 1995). Similarly, the federal courts of appeals have steadfastly refused to apply this heightened level of scrutiny to inverse condemnation claims based on an economic taking and have declared that this intermediate standard only applies to title dedication or exaction claims.

See, e.g., *New Port Largo Inc. v. Monroe County*, 95 F.3d 1084, 1088, (11th Cir. 1996), *cert. denied*, 117 S. Ct. 2514 (1997) (*Dolan's* rough proportionality test does not apply to county that rezoned landowner's beach front property from residential duplex use to private airport use); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578-79 (10th Cir. 1995) (*Dolan's* rough proportionality does not apply to state regulations that limit the right to hunt surplus game on rancher's property).

In an economic taking case, hence in this case, the scope of legitimate state interest is extremely broad and challenged regulations will not be construed to effectuate a taking as long as the governmental entity has *rationally* concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125 (1978). Thus: (1) when "public purpose" is at issue this Court has held that any "conceivable" public purpose will satisfy this test. (See also *F.C.C. v. Beach Communications Inc.*, 508 U.S. 307 (1993)) (any "conceivable" public purpose will satisfy economic and social legislative action under constitutional scrutiny); and (2) when the relationship between the public purpose and the regulation is analyzed the Supreme Court has continuously held that a regulation "substantially advances" a legitimate state interest if the regulation is *rationally related* to the public interest. *Penn Central Transportation Co. v. New York City*, 438 U.S. at 125-127; *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984).

In this case, the Ninth Circuit's decision to apply the rough proportionality test to an inverse condemnation claim based on an economic taking appears to result from a misreading of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), that in a *title dedication* taking the government must demonstrate a rational nexus between the purpose of the regulation and the title condition imposed. Efforts to extend the *Nollan/Dolan* tests in these ways are

without authority, and, if affirmed, would overturn every general economic taking case this Court has ever decided. See *Villas of Lake Jackson Ltd. v. Leon County*, 121 F.3d 610 (11th Cir. 1997). It would cause governmental entities to bear the burden of proving that each and every individual standard contained in their planning and zoning legislative policies were roughly proportional to the impact of regulation upon the property affected. Imposition of any such heightened standard would stifle governmental entities' police powers, thwart their ability to regulate private property for the public good, and undermine their ability to facilitate land-use planning. In essence, the adoption of a heightened standard for inverse condemnation claims based on an economic taking would give the federal courts the responsibility to sit as the "super legislatures" of the nation on local issues of land-use planning and zoning—a concept at odds with our Constitution's respect for both federalism and separation of powers.

## ARGUMENT

### I. THIS COURT HAS NEVER APPLIED AN INTER-MEDIATE STANDARD OF HEIGHTENED SCRUTINY TO INVERSE CONDEMNATION CLAIMS BASED SOLELY ON AN ECONOMIC TAKING

If affirmed, the Ninth Circuit's application of *Dolan's* rough proportionality standard to inverse condemnation claims based on an economic taking (other than in the narrow categorical, title or exaction takings) would yield an outright assault on a governmental entity's police powers to plan and zone. Such a decision would undermine a governmental entity's ability to effectively engage in land-use planning and would jeopardize the health, safety, morals, and general welfare of the community. The Court recognized this in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922): "Government could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are



enjoyed under an implied limitation, and must yield to the police power." *Id.* at 413.

In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125 (1978), the court articulated a comprehensive test for analyzing inverse condemnation claims.

The Court stated that three factors should be considered in identifying a regulatory taking: the economic impact of the regulation on the claimant; the extent to which the regulation has interfered with distinct investment-backed expectations; and the character of the government action. *Id.* at 124; See Daniel R. Mandelker, *Investment-Backed Expecations in Taking Law*, 27 Urb. Law. 215 (1995). The *Penn Central* Court further noted that a taking may "more readily be found when the interference with the property can be characterized as a physical invasion by the government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.*; See Thomas E. Roberts, Karen E. Milner and Robert I. McMurry, *Land Use Litigation: Doctrinal Confusion Under The Fourteenth Amendment and Fifth Amendment*, 28 Urb. Law. 765 (1996).

Since *Penn Central*, this Court has recognized three types of regulatory takings—physical, title, and economic. See Robert H. Freilich & Elizabeth A. Garvin, *Takings After Lucas: Growth Management, Planning, And Regulatory Implementation Will Work Better Than Before*, 22 Stetson L. Rev. 409, 411 (1993). First, this Court has determined that a *physical* invasion or a regulatory activity that produces a *physical* invasion will sufficiently support an action for inverse condemnation. See *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Second, this Court has found an inverse condemnation claim to lie where a regulation imposes *title* dedication as a condition of development approval without rational nexus or rough proportionality to the need created by the

development. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Third, in *economic* regulatory taking cases, this Court has long determined when a regulatory activity fails to substantially advance a legitimate state interest or denies a property owner all or substantially all economically viable use of an owner's land, it will give rise to an inverse condemnation claim. See *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

#### A. Physical Takings

A physical taking will be found when a governmental entity physically invades private property regardless of the extent of the diminution of the property value. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), a privately owned pond was made accessible to navigable waters by physical dredging, requiring public access to these navigable waters. *Id.* at 175-76. The Court explained that "[t]his is not a case in which the Government is exercising its regulatory power in a manner that will cause a substantial devaluation of [the landowner's] private property; rather, the imposition of the navigational servitude in this context will result in an actual *physical invasion* of the privately owned marina." *Id.* at 180.

Similarly, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), provided that any regulation—regardless of the government's interest—which authorizes a *permanent physical invasion* of a landowner's property constitutes a taking. *Id.* at 426. However, the Court specifically noted that this *per se* taking rule does not apply to "appropriate restrictions upon an owner's use of property." *Id.* at 428, 441 (*i.e.* economic taking claims).

#### B. Title or Exaction Takings

Title or exaction takes do not result in physical invasion but result from government placing a title dedica-

tion, or a monetary exaction or payment in lieu of dedication. See Robert H. Freilich & Elizabeth A. Garvin, *Takings After Lucas: Growth, Management, Planning, And Regulatory Implementation Will Work Better Than Before*, 22 Stetson L. Rev. 409, 414 (1993). (a title take inquiry focuses solely where the government "acquires incidents of ownership or title to the property or an exaction in lieu of the dedication of land").

These title dedications or exactions are the result of the enormous national and local deficiencies in infrastructure resulting from the failure of government to require that new development pay its one-time fair share of capital costs generated by the development. See Joint Economic Committee of the United States Congress, *Hard Choices: Summary Report of the National Infrastructure Study* (1984); Nancy A. Rutledge, *Report of President Regan's National Council on Public Works Improvement*, Volume 11, "Public Infrastructure, A National Concern" (recommending "developer financing of offsite infrastructure investments"); Arthur C. Nelson, *Development Impact Fees: The Next Generation*, 26 Urb. Law. 541 (1994); Franklin J. James, *Evaluation of Local Impact Fees As A Source of Infrastructure Finance*, 11 Municipal Finance J. 408, 411 (1990).

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court required that in cases involving permanent dedication of title, an "essential nexus" must exist between the title condition imposed and the stated police power objective of requiring development to meet the needs created by the development. *Id.* at 837. Under this test, the dedication must serve the same governmental purpose as the regulation. Hence, the Court employed a heightened level of scrutiny differentiating the *ad hoc* factual inquiry balancing test of an economic take as enunciated in *Penn Central*.

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court addressed the question of a second nexus required

between the city's permit conditions of title or exaction and the projected impact caused by the proposed development. *Id.* at 388. To evaluate this question, the *Dolan* Court articulated a two-pronged test. First, as determined in *Nollan*, there must exist an essential nexus between legitimate state interests and the permit conditions. *Id.* at 386. Second, the exaction required by the permit condition must be roughly proportional to the projected impact of the proposed development. *Id.* at 391. Under this prong, the government bears the burden of proof and must show that the dedication or exaction is roughly proportional to the impact of the project. *Id.* The Court intended this two-prong test to function as a higher standard of review. Finally, the Court noted that traditional land-use planning tools such as dedications for streets, sidewalks and other public ways will generally be considered reasonable exactions. *Id.* at 395.

The *Dolan* Court recognized that the reasonable relationship test imposed by the majority of state courts would satisfy the dual nexus test. The Court found that the majority of the state courts already used an intermediate level of scrutiny in title or monetary exactions in lieu of dedication, referencing, among others, *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 807 (Tex. 1984); and *Simpson v. City of North Platte*, 292 N.W.2d 297, 301 (Neb. 1980).

Imposition of land dedication or an exaction requirement differs significantly from application of general standards or conditions imposed on a development application. Typically, a development application is subject to uniform standards set forth in a municipality's comprehensive plan or zoning. In virtually every land development situation, the project must meet standards, such as height limitations or set-back requirements. In lieu of denial of a project, site specific additional conditions are frequently imposed (e.g. preserving the environmental integrity of the



subject property and surrounding land, or habitat restoration).<sup>3</sup>

Compliance with standards and conditions always involves some forbearance or performance on the part of the landowner. Meeting a height, setback or rear yard limitation on structures involves foregoing building to greater area or elevation. Mitigating environmental effects may require preservation of particularly sensitive lands and restoring habitat on other land, as was required in this case. Such collective limitations or requirements, however, do not involve dedication of land to the public, but establish the net development potential for the property. See *Presbytery v. King County*, 787 P.2d 907 (Wash. 1990), cert. denied 498 U.S. 911 (1990) (overruling *Allingham v. City of Seattle*, 749 P.2d 160 (Wash. 1988) that a rear yard setback constituted a severable title take). Such collective limitations form the basis of an economic taking challenge, not a physical or title taking challenge.

Under the Ninth Circuit's rough proportionality test, however, each and every standard or condition applied to a development proposal is subject to an individual "substantially advances" taking challenge, rather than a challenge to the collective limits imposed by the regulations on the exercise of property rights.<sup>4</sup> A standard height limitation might be challenged under the theory that it was not "roughly proportional" to the "nature and extent" of the proposed development. Municipalities would be faced with the prospect of modifying or defending each and every one of its regulatory standards on an *ad hoc* basis for every development project in order to avoid rough proportionality challenges.

<sup>3</sup> *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

<sup>4</sup> Note that the Eleventh Circuit in *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610 (11th Cir. 1997) has soundly rejected the notion that there is a *Nollan* substantially advancing due process taking challenge for mere economic regulation, overturning *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990).

### C. Economic Takings

Economic takings, as distinguished from *physical* or *title* takings, constitute the vast majority of inverse condemnation claims based on regulatory takings. In economic taking claims, this Court, in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), stated that a land-use regulation does not effect a taking if "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land." *Id.* at 260.

Economic takings have been reviewed with great deference by the Supreme Court, specifically when it comes to what constitutes a state interest and the relationship required between the regulation and the public interest. As to the first prong of this test, the scope of legitimate state interest is extremely broad and will be given the widest latitude under the taking clause and the substantive due process clause. See *Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 637 (1993); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954). The Court in *Hawaii Housing Authority*, made abundantly clear that the Court should not substitute its judgment for a legislature's judgment:

When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socio-economic legislation—are not to be carried out in the federal courts. 467 U.S. at 241-242.

The Court has also found that governmental action is entitled to a presumption that it legitimately advances the public interest. See, e.g., *Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 637 (1993). Local governmental action will not be construed to effectuate a taking as long as the governmental entity has *reasonably* concluded that "the health, safety, morals, or general welfare" would be promoted by

prohibiting particular contemplated uses of land." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125 (1978). In that case, the Court cited a long history of decisions by the judiciary that allowed state regulations that were "reasonable." *Penn Central Transportation Co. v. New York City*, 438 U.S. at 125-126.<sup>5</sup>

Under the second prong of the test, a court must determine whether the property maintains any permanent beneficial value, when viewed as a whole. See, e.g., *Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 643-44 (1993); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Hodel v. Irving*, 481 U.S. 704 (1987). In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court concluded that unless the owner is denied all economically viable use of the land, then a court should return to the traditional *Penn Central* balancing of interests test. The viability of the land has traditionally been evaluated in its totality. See, e.g., *Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 at 643-44 (1993) ("to the extent that any portion of the property is taken, that portion is always taken in its entirety, the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question," thus resolving footnote 7 in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, fn.7 (1992), which states, if, "for example, a regu-

<sup>5</sup> The only Supreme Court pronouncement to the contrary is the Majority's opinion in *Nollan v. California Coastal Commission*, in Footnote 3, in which the Court states, "We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved . . . , not that 'the State 'could rationally have decided' that the measure adopted might achieve the State's objective." *Nollan v. California Coastal Comm'n*, 483 U.S. 825 at Footnote 3. However, even if not explicitly stated, this statement was made in the context of a title taking and the Court in *Dolan v. City of Tigard* clarified this when it expressly applied *Nollan* to the factual situation of title dedication. *Dolan v. City of Tigard*, 512 U.S. at 377, 386.

lation requires a developer to leave 90 percent of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.").

This principle of looking at the totality of the land has been a constant in economic takings jurisprudence. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Keystone Bituminous Coal Ass'n v. De-Benedictis*, 480 U.S. 470 (1987).

The federal and state courts have uniformly held that all substantial use of the property must be lost before an economic taking occurs. A *per se* taking occurs only if the regulation denies the owner of 100 percent of the economically viable use of the land unless the regulation is establishing a common law nuisance principle. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). However, if the landowner has not been denied all economically viable use, the court returns to a balancing of interests as elucidated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), *reh'g denied* 439 U.S. 883 (1978). See also *Faux-Burhans v. Board of County Commissioners*, 674 F.Supp. 1172 (D.Md. 1987), *aff'd* 859 F.2d 149 (4th Cir. 1988), *cert. denied* 488 U.S. 1042 (1989). *Terminals Equipment Co. v. City and County of San Francisco*, 221 Cal.App. 3d 234, 270 Cal.Rptr. 329 (Cal.App. 1990) (restating rule that "all" reasonable use must be denied); *De Botton v. Marple Township*, 689 F.Supp. 477 (E.D.Pa. 1988) (finding no taking because "all" uses of property have not been denied); *City of Virginia Beach v. Virginia Beach Land Inv. Ass'n No. 1*, 389 S.E.2d 312 (Va. 1990) (downsizing of 403 acre parcel from PUD to agriculture



was not a taking because no deprivation of "all" economically viable use).<sup>6</sup>

Economic takings cases since *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), have made clear that diminution in land value, absent a deprivation of all reasonable and substantial value, does not constitute a taking. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), (no taking despite a 78 percent reduction in land value); *Haas & Co. v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) (95 percent reduction in value no taking), *cert. denied* 445 U.S. 928, *reh'g denied* 446 U.S. 929 (1980); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023 (3d Cir. 1987) (90 percent reduction, \$495,000 to \$52,000, is not a taking), *cert. denied* 482 U.S. 906, *reh'g denied* 483 U.S. 1040 (1987); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (holding that a 91.5 percent reduction, \$800,000 to \$60,000, is not a taking).

These cases have been recently summarized by this Court in *Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), which reiterated that in economic takings the property must be viewed in its entirety and that diminution of value of 78 percent and 91.5 percent (citing *Euclid* and *Hadacheck*) are not takings.

<sup>6</sup> The *Del Monte Dunes* case is also a total anomaly to other Ninth Circuit cases. In *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1987), *modified* 857 F.2d 567 (9th Cir. 1987) (the court interpreted *First English* to mean that a taking does not occur unless the property owner demonstrates that all or substantially all economically viable use of the property has been denied"), *cert. denied*, 489 U.S. 1090 (1989).

**II. THIS COURT HAS ADOPTED AN INTERMEDIATE STANDARD OF HEIGHTENED SCRUTINY SOLELY FOR THE NARROW CATEGORICAL EXCEPTIONS OF TITLE OR EXACTION TAKINGS AND THE LOWER COURTS HAVE USED THE ROUGH PROPORTIONALITY TEST SIMILARLY, SOLELY FOR TITLE OR EXACTION TAKINGS AND NOT FOR ECONOMIC TAKING CLAIMS**

Numerous cases have properly declined to apply *Dolan's* rough proportionality test to claims other than title or exaction takings. In *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (11th Cir. 1996), *cert. denied* 117 S.Ct. 2514 (1997), the court rejected applying *Dolan's* rough proportionality standard to an economic regulatory taking claim. *Id.* at 1088. In *New Port Largo*, a landowner sued the county for a temporary regulatory taking and deprivation of due process, after the county rezoned its beach front property from residential duplex use to private airport use. *Id.* at 1087.

The court in *New Port Largo* rejected using the heightened level of scrutiny required under the *Nollan/Dolan* paradigm. The Court explained:

In [*Nollan* and *Dolan*] a state had demanded that a person open his or her property to public traffic, again without just compensation. That fact distinguished NPL's situation: the regulation in this case told NPL how it could use the property for profit, but did nothing to require NPL to open its property to the public for use just as the public wished.

*Id.* at 1088.

The Tenth Circuit, in *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995), also held that *Dolan's* proportionality test did not apply to an economic regulatory taking. *Id.* at 1578. In *Clajon*, the issue before the court was whether Wyoming's two-license limit on supplemental hunting licenses issued to large landowners violated the takings and equal protection clauses of the

Fifth Amendment. *Id.* at 1569. The landowners had alleged that they enjoyed a common law property right to hunt surplus game on their lands and that the Wyoming regulation constituted an inappropriate "leveraging of police power" which deprived them of their property rights without justly compensating them. *Id.* at 1576.

The court in *Clajon* declined to apply *Dolan's* rough proportionality test to the landowners' claim. In so doing, the court recognized that *Dolan's* rough proportionality does not apply to all regulatory takings, but is instead "limited to the context of development exactions where there is a physical taking or its equivalent." *Id.* at 1578. The court further argued that this test must be limited to development exactions "[g]iven the important distinctions between general police power regulations and developmental exactions [or] physical taking cases . . . ." *Id.* The court concluded by noting:

In our judgment, both *Nollan* and *Dolan* follow from takings jurisprudence's traditional concern that an individual cannot be forced to dedicate his or her land to public use without just compensation. That is *Nollan* and *Dolan* essentially view the conditioning of a permit based on the transfer of a property interest—*i.e.*, an easement—as tantamount to physical occupation cases to those situations in which the government achieves the same end (*i.e.*, the possession of one's physical property) through a conditional permitting procedure.

*See also Springer, Grubb & Associates v. City of Hailey*, 903 P.2d 741, 747 (Idaho 1995), that held *Dolan* is limited to property exactions and does not apply to regulatory rezoning activities because:

*Dolan* is distinguishable. It involved the reasonableness of conditions exacted on a property owner before the community would grant a building permit. One condition required the owner to dedicate a portion of his property for public use as a bicycle/

pedestrian pathway. The United States Supreme Court's holding required the lower court to make a finding as to "proportionality" between the exactions required and the projected impact of the proposed development. Here there has been no exaction, nor a taking for all uses for any portion of the subject property.

*Id.* at 747.

*See also Pringle v. City of Wichita*, 917 P.2d 1351, 1357 (Kan. Ct. App. 1996) (*Dolan's* rough proportionality test does not apply to a challenge to a city's decision to close an intersection while completing a new four lane freeway); *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996) (*Dolan's* rough proportionality test does not apply to challenge to city ordinance requiring mobile home park owners who close their parks to pay relocation costs to park residents).

### III. THE COURT OF APPEALS ERRONEOUSLY APPLIED THE *DOLAN* ROUGH PROPORTIONALITY TEST TO INVERSE CONDEMNATION CLAIMS BASED ON ECONOMIC TAKINGS

#### A. Supreme Court Precedent

This Court has adopted the rough proportionality test to serve as a heightened standard of scrutiny only in inverse condemnation claims involving title takings or exactions in lieu of dedication. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). The Ninth Circuit erroneously applied this standard to an inverse condemnation claim involving solely an economic taking, without explanation or justification. Indeed, the Court did not cite one single case to support the validity of applying a heightened standard to an economic taking case. No dedication of land or exactions in lieu of dedication were imposed as project conditions by the City of Monterey. The Ninth Circuit's decision to apply this heightened standard to



inverse condemnation claims involving an economic taking runs contrary to every takings case this Court has decided. See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

In *Del Monte Dunes*, the landowner challenged the City's rejection of its applications to build 190 (or more) residential units on its property. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1499 (9th Cir. 1990). While the repeated rejections of the landowner's applications may warrant sympathy, they are *not* title takes or exactions. In *Del Monte Dunes*, the City did not mandate or authorize a physical invasion or a title dedication or exaction as a condition for development approval. The City never attempted to coerce Del Monte Dunes into yielding some incident of ownership connected with its land. Under its police power, a city has broad authority to regulate land as long as the governmental entity has reasonably ensured that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125 (1978).

Here, the City denied development approval causing an allegation that this resulted in an economic taking based on deprivation of all substantial economic value during the temporary period of the alleged take. This denial should be evaluated under the test established in *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

It would indeed be a dramatic leap for this Court to apply a heightened level of scrutiny to inverse condemnation claims based on an economic taking because there is no precedent for such a heightened level of scrutiny to be applied to an economic takings claim.

**B. If *Dolan* Applies To Economic Takings, *Lochner*<sup>7</sup> Substantive Due Process Will Be Resurrected To the Substantial Detriment of the Public Health, Safety and Welfare**

Assuming arguendo that the heightened scrutiny standard was extended to all inverse condemnation claims based on economic takings, the federal courts would be intruding upon local governmental entities' ability to utilize their police power to plan and regulate the character of their communities.

Justice Holmes, who wrote *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) in 1922 at the height of the *Lochner* era, nevertheless noted that local governments must have the ability to effectively use their police power. To allow heightened scrutiny would run counter to this Court's long-standing notion that legislatures will be given the widest latitude in economic and social policy under the takings clause, substantive due process and equal protection clauses. See, e.g., *FCC v. Beach Communications Inc.*, 508 U.S. 307, 313 (1993); *Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 637 (1993); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).<sup>8</sup>

<sup>7</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>8</sup> See *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1222 (6th Cir. 1992), in which the court summarized the positions of all eleven circuits on substantive due process to demonstrate that "local zoning actions would fall to substantive due process only if they shocked the conscience;" by its "shocks the conscience" terminology, it was referring to extreme irrationality. As recently as *Schenck v. City of Hudson*, 114 F.3d 590, 594 (6th Cir. 1997), the Court of Appeals recited the case holdings of all eleven circuits that federal courts won't sit as "super zoning boards" and that unless the legislative body was completely irrational, substantive due process will be met. See *Bituminous Materials, Inc. v. Rice County, Minnesota*, 126 F.3d 1068, 1070 (8th Cir. 1997); *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992) (the theory of substantive due process is properly reserved for truly egregious and extraordinary cases).

Imposing a heightened standard of scrutiny to economic regulations which merely diminish value would affect almost all land-use regulations as applied to every parcel of land and would: (1) revive *Lochner*-type substantive due process and empower the federal courts to sit as super legislatures; (2) as a practical matter, shift the presumption in land-use cases from validity to invalidity; (3) cause more litigation in the already overburdened federal court system; and (4) jeopardize the validity of all land-use regulations and the public health, safety and welfare that they protect. See Jonathan M. Block, *Limiting the Use of Heightened Scrutiny to Exaction Cases*, 71 N.Y.U. L.Rev. 1021 (1996).

The importance of effective land-use regulation was first recognized by this Court in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), which with farsighted vision stated:

Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple, but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.

Since then, cities, counties, and states have utilized the opportunity to use planning and zoning to deal with the countless problems of urbanization. These entities have used planning to deal with the great crises and problems of our modern day era. State and local governments have used planning to reduce congestion and sprawl,<sup>9</sup> save his-

<sup>9</sup> *Haviland v. Land Conservation and Development Commission*, 609 P.2d 423 (Or. 1980) (by establishing urban growth boundaries).

toric districts,<sup>10</sup> foster affordable housing,<sup>11</sup> promote economic development,<sup>12</sup> protect the environment,<sup>13</sup> reduce infrastructure deficiencies,<sup>14</sup> and save agricultural land.<sup>15</sup> However, if a heightened standard is employed by this Court, governmental entities will have great difficulty accomplishing these purposes for the public good.

This was stated well in *Associated Home Builders of the Greater East Bay, Inc. v. Livermore*, 557 P.2d 473 (Cal. 1976), a decision known for its critical scrutiny of exclusionary local zoning as:

Most zoning and land use ordinances affect population growth and density. As commentators have observed, to insist that such zoning laws are invalid unless the interests supporting the exclusion are compelling in character, and cannot be achieved by an alternative method, would result in wholesale invalidation of land use controls and endanger the validity of city and regional planning.

Finally, a heightened standard would reverse the fundamental constitutional policies in effect in this nation since

<sup>10</sup> *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), *reh'g denied*, 439 U.S. 883 (1978) (preserving historic landmarks and districts).

<sup>11</sup> *Southern Burlington County N.A.A.C.P. v. Mount Laurel Township*, 456 A.2d 390 (N.J. 1983) (promoting affordable housing and inclusionary zoning).

<sup>12</sup> *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla. 1980) (upholding bonds for redevelopment and economic plan of city).

<sup>13</sup> *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (In passing upon a plan the city also will consider how well the proposed development will preserve the surrounding environment).

<sup>14</sup> *Palm Beach County v. Wright*, 641 So.2d 50 (Fla. 1994) (protecting the right of way of future transportation corridors).

<sup>15</sup> *Sierra Club v. Hayward*, 623 P.2d 180 (Cal. 1981) (upholding agricultural zoning and tax assessment restrictions to preserve agricultural land).



its founding. Land-use policy has always been the domain of state and local government.<sup>16</sup> This Court has said repeatedly, perhaps no more important local government power and responsibility to the people exists than the determination of land-use governance and planning for the future of the community. See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 72 (1976); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

To impose a heightened standard of review on land-use regulations would be to place federal court supervision over the truly most local activity of state and local government. It is important to emphasize that there is no national land-use policy.<sup>17</sup> The underlying rationale is obvious: land-use policy is of local concern and is inherently dependent upon local political, economic, social, aesthetic, geographical, and environmental issues which are more effectively analyzed and resolved by those government entities which have intimate knowledge and understanding of those elements.<sup>18</sup> Especially is this true in light of the

<sup>16</sup> Henry M. Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 493 (1954).

<sup>17</sup> See H. Doc. No. 91-34 (91st Congress), National Commission on Urban Problems ("Douglas Commission Report" *Building The American City* (1976); Advisory Commission on Intergovernmental Relations, *Urban and Rural America: Policies for Future Growth* (1968); Secretary of Housing and Urban Development, *1980 President's National Urban Policy Report* (1980).

<sup>18</sup> The importance of local involvement is emphasized by the concept of direct legislation: initiative and referendum powers in local zoning and planning. In upholding the constitutional validity of the zoning referendum, the Supreme Court, in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 676 (1976), held that the electorate was free to control zoning so long as their decision was not "clearly arbitrary and unreasonable." Legislation affecting land use is no longer to be totally excluded from such a process than to abolish the entire initiative and referendum process because some argue that the people are selfish, ignorant, and parochial in their attitudes.

lack of any paramount preemptive, conflicting or intervening federal statutory policy. This Court has always adhered to the principle that state and local governments must have the ability to function as independent centers and laboratories for planning and economic policy. This principle has carried through the jurisprudence of this Court for over a century and a half, from *Anderson v. Dunn*, 19 U.S. 204, 226 (1821) ("the science of government . . . is the science of the experiment") to *Roth v. United States* (Harlan J.), 354 U.S. 476, 505 (1956) ("It has often been said that one of the great strengths of our federal system, is that we have, in the forty-eight states, forty-eight experimental laboratories.") and *Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226, 264-265 (1982) ("Flexibility for experimentation not only permits each state to find the best solutions to its own problems, it is the means by which each state may profit from the experiences and activities of all the rest.").

This Court should reject heightened scrutiny in economic regulatory taking claims based on faulty analogy to the *Dolan* standard.

**CONCLUSION**

For the foregoing reasons, the judgment of the Court of Appeals should be reversed. Specifically, the answer to the third certified question ("Can reasonable proportionality standard established by *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in context of property exactions properly be applied to inverse condemnation action based upon regulatory denial?") should be "no."

Respectfully submitted,

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No. 97-1235

Supreme Court, U. S.

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In The  
**Supreme Court of the United States**  
October Term, 1997

CITY OF MONTEREY,

*Petitioner,*

v.

DEL MONTE DUNES AT MONTEREY, LTD., et al.,

*Respondents.*

On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit

BRIEF OF THE CITY AND COUNTY OF  
SAN FRANCISCO AND 86 CALIFORNIA CITIES  
AND COUNTIES AS AMICUS CURIAE IN  
SUPPORT OF PETITIONER CITY OF MONTEREY

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## STATEMENT OF INTEREST OF AMICUS CURIAE

Under Supreme Court Rule 37.4, amicus curiae City and County of San Francisco, joined by the 86 California cities and counties identified below, submit this brief in support of petitioner City of Monterey.<sup>1</sup> This case involves (1) the traditional right of a regulatory government agency to a trial by the court, rather than by a jury, to determine the agency's liability for a taking under the Fifth Amendment to the U.S. Constitution, and (2) the standard of judicial review of the decisions of administrative and legislative bodies to regulate the use of land.

With respect to the first question, the Ninth Circuit Court of Appeals held that a jury may decide the liability of a city for a taking. With respect to the second question, the Ninth Circuit eliminated the judicial deference to the decisions of local government to regulate land use, a deference that has been fundamental in our system of justice for more than 70 years. Because the availability of a jury in inverse condemnation cases and the standard of judicial review of land use regulation could have profound implications for local governments, the Court should have before it the viewpoint of these California cities and counties.

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 INTRODUCTION

The decision of the Ninth Circuit represents a radical departure from the standard of judicial review of land use regulation that has prevailed under the rulings of this

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<sup>1</sup> See cities and counties listed on previous pages.

Court for more than 70 years. The decision takes responsibility for land use policies from state and local governments that are accountable to their communities for those policies and hands that responsibility to federal juries. San Francisco and 86 California cities and counties join the City of Monterey in requesting reversal of the Ninth Circuit's decision.

In *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, the Ninth Circuit held for the first time that a plaintiff is entitled to a jury trial in an inverse condemnation case. In so holding, the Ninth Circuit misconstrued the controlling precedent of this Court. In *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 245 (1897), this Court held that there is no right to a jury trial for cases under the Takings Clause of the Fifth Amendment. At the time of this Court's decision, the application of the Takings Clause was limited to eminent domain, namely, the government's physical appropriation of land, also known as direct condemnation. Since that time, however, the application of the Takings Clause has been expanded to inverse condemnation, namely, property owners' suits from indirect takings resulting from government regulation of land use. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 122 n.25 (1978).

This Court has made clear that both direct and inverse condemnation actions arise under the Takings Clause of the Fifth Amendment. *Jacobs v. United States*, 290 U.S. 13, 16 (1933). Thus, the same rules regarding the right to a jury trial apply to both. Amici urge this Court to correct the Ninth Circuit's deviation from this Court's precedent.

In addition to affording parties the right to a jury to determine the government's liability for a taking, the Ninth Circuit erred in shifting the fundamental balance of power for land use regulatory policy between the courts on the one hand and the administrative and legislative branches of government on the other. With the exception of the narrow class of regulation that (1) allows a physical invasion of property, (2) deprives property of all economically viable use, or (3) requires the dedication of land to the public as a condition of approval of development, the decisions of this Court have uniformly held that local governmental regulation of land is entitled to a deferential standard of judicial review. Under this deferential test, the party challenging the regulation has the burden to show that the regulation does not substantially advance a legitimate state interest. Judicial deference to state land use regulation, firmly rooted in the doctrine of separation of powers, means that courts find that a land use regulation effects a taking only in the most extreme circumstances.

The decision of the Ninth Circuit changes all this. The opinion raises the standard of review of all land use regulation to heightened scrutiny. Moreover, the Ninth Circuit has shifted the burden to the public agency to demonstrate that its regulation substantially advances a legitimate state interest. As a result, the Ninth Circuit has transferred final authority over state and local land use policy – historically the province of local legislatures and administrative agencies – to federal juries.

This new scheme would create a groundswell of litigation; any disappointed applicant for a building permit



would be able to ignore the legislative and administrative forum and take the case to a court. Unless reversed, the decision will effectively nullify the state and local legislative and administrative process that has traditionally formulated land use policy.

Moreover, if upheld, the decision of the Ninth Circuit would allow a judge or jury to substitute their views as to the wisdom and efficacy of particular economic and social regulations for the judgment of legislatures, planning commissions, and city councils. In effect, judges and juries would function as zoning boards of appeals to sit in review of any land use regulation.

San Francisco and amici cities and counties respectfully request that the Court reverse this far-reaching decision.

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#### STATEMENT OF THE CASE

The property at issue consists of approximately 37 acres overlooking the Pacific Ocean in the City of Monterey, California ("Monterey"). Beginning in 1981, the owner of the property, Ponderosa Homes, made several unsuccessful attempts to develop the property with houses.

While Ponderosa's last application to build 190 homes was pending with Monterey, respondent Del Monte Dunes at Monterey, Ltd. and Monterey-Del Monte Dunes Corporation ("Del Monte") purchased the property and pursued the application. In 1986, Monterey denied Del Monte's application.

Del Monte brought an action in the district court against Monterey for inverse condemnation, violations of its due process and equal protection rights, estoppel, and unjust enrichment. The district court held that Del Monte's constitutional claims were not ripe for review and dismissed. The Ninth Circuit reversed, finding that the constitutional claims were ripe for adjudication. *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1506 (9th Cir. 1990).

On remand, over the objection of Monterey, the district court ordered the inverse condemnation and equal protection claims tried by a jury. The district court instructed the jury that it could find Monterey liable for inverse condemnation if there was no "reasonable relationship" between Monterey's denial of Del Monte's project and a legitimate public purpose. After a trial, the jury found that Monterey was liable to Del Monte for inverse condemnation and for a violation of Del Monte's equal protection rights. The jury awarded Del Monte \$1,450,000 in damages.<sup>2</sup> The Ninth Circuit affirmed. *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *reaff'd on reh'g*, 127 F.3d 1149 (9th Cir. 1997) (Appendix to Monterey's Petition for Certiorari ["App."]).

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<sup>2</sup> Amici cities and counties do not dispute that once liability for inverse condemnation has been established, the question of damages should be tried to a jury. See *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1092 (11th Cir. 1996), *cert. denied*, \_\_\_ U.S. \_\_\_, 117 S.Ct. 2514, 138 L.Ed.2d 1016 (1997); *Mid Gulf, Inc. v. Bishop*, 792 F. Supp. 1205, 1215 (D. Kan. 1992); *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 771 F. Supp. 911, 913 (N.D. Ill. 1991).

## ARGUMENT

### I. IN ALLOWING A JURY TO DETERMINE LIABILITY FOR A TAKING, THE NINTH CIRCUIT MISCONSTRUED CONTROLLING PRECEDENT OF THIS COURT.

#### A. There Is No Right To A Jury In Cases Arising Under the Takings Clause.

Inverse condemnation cases arise directly out of the self-executing character of the Takings Clause of the Fifth Amendment. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315-17 (1987), citing *United States v. Clarke*, 445 U.S. 253, 257 (1980). Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Clarke*, 445 U.S. at 257. Inverse condemnation differs from direct condemnation ("eminent domain") only insofar as the action is initiated by the property owner. See *First English*, 482 U.S. at 315-17; *Agins v. City of Tiburon*, 447 U.S. 255, 258 n.2 (1980). This Court long ago acknowledged that direct and inverse condemnation stem from the same basic right:

The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment.

*Jacobs v. United States*, 290 U.S. at 16.

The right to a jury trial for claims under the U.S. Constitution is determined by the Seventh Amendment. The Seventh Amendment provides: "In suits at common law, . . . the right of trial by jury shall be preserved." U.S. CONST. amend VII. The Ninth Circuit determined that because an inverse condemnation action is a suit "at common law," *Del Monte* was entitled to a jury under the Seventh Amendment. But this Court has held that the Seventh Amendment merely "preserves" the right to a jury for actions for which a right to jury trial existed in 1791 when the Seventh Amendment was ratified. *Markman v. Westview Instruments*, 517 U.S. 370, 116 S.Ct. 1384, 1389, 134 L.Ed.2d 577 (1996); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 40-42 (1989); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 459-60 (1977).

When this Court first applied the Takings Clause to the States, the Court confirmed that no right to a jury trial existed for condemnation in 1791:

[B]efore the establishment of the government of the United States[,] it had been the practice in this country and in England to ascertain by commissioners, special tribunals and other like agencies, the compensation to be made to owners of private property taken for public use, and it was not to be supposed that the general provisions in American constitutions, national and state, preserving the right of trial by jury, superseded that practice. [citation omitted.]

*Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. at 245; see also *Atlas Roofing Co.*, 430 U.S. at 458; *United States v. Reynolds*, 397 U.S. 14, 18 (1970), citing *Bauman v. Ross*, 167 U.S. 548,



593 (1897) (estimate of just compensation for property taken under right of eminent domain is not required to be made by a jury) and 5 JEREMY C. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 38.32(1) at 240-49 (2d ed. 1978) ("MOORE'S 2d ed.") (practical and jurisprudential history both before and after 1791 lead to conclusion that there is no constitutional right to jury trial in federal condemnation action); 8 JEREMY C. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 38.33(4)(a) at 125 (3d ed. 1997) ("MOORE'S 3d ed.") (no right to jury trial existed for takings in 1791).

Accordingly, because inverse condemnation actions are premised on the Takings Clause, and there is no right to a jury in direct condemnation actions, inverse condemnation actions also do not implicate the right to a jury trial. See *New Port Largo, Inc.*, 95 F.3d at 1092; *c.f. Department of Agric. & Consumer Services v. Bonanno*, 568 So.2d 24, 28 (Fla. 1990) (no right to jury trial for inverse condemnation under Florida Constitution because no right to jury trial for condemnation at common law). The Eleventh Circuit has adopted this view:

"We have discovered no indication that the rule in regulatory takings cases differs from the general eminent domain framework, in which issues pertaining to whether a taking has occurred are for the court, while damages issues are the province of the jury."

*New Port Largo, Inc.*, 95 F.3d at 1092.<sup>3</sup>

<sup>3</sup> The only other federal courts to address the issue of the right to trial by jury in an inverse condemnation case agreed with the Eleventh Circuit. See *Mid Gulf, Inc. v. Bishop*, 792 F. Supp. at 1215 (liability for inverse condemnation raises question

To find a right to a jury in an inverse condemnation case, the Ninth Circuit attempted to distinguish the rule in direct condemnation cases. Without authority, the Court reasoned that direct condemnation proceedings are not tried before a jury because the United States traditionally is a party. App. 8 (citing commentary and case law relating to Federal government's waiver of sovereign immunity to jury trial for inverse condemnation). But as shown above, the rule precluding a jury in condemnation actions is rooted in the consistent practice of our country before the adoption of the Seventh Amendment. See *Chicago, B. & Q. R. Co.*, 166 U.S. at 245; *Atlas Roofing Co.*, 430 U.S. at 458; *United States v. Reynolds*, 397 U.S. at 18; *Bauman v. Ross*, 167 U.S. at 593; 5 MOORE'S 2d ed., ¶ 38.32(1) at 240-49; 8 MOORE'S 3d ed., ¶ 38.33(4)(a) at 125.

The Ninth Circuit found a right to a jury on the liability issue because Del Monte's inverse condemnation claim raised mixed questions of fact and law and Del Monte sought a damages remedy. App. 11-15. The former reason is not relevant to the jury issue; direct condemnation cases also raise mixed questions of law and fact. See, *e.g.*, *United States v. 21.54 Acres of Land*, 491 F.2d 301,

of law to be determined by the court); *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 771 F. Supp. at 913 (liability for inverse condemnation presented question for the court). The Eleventh Circuit's position is also consistent with the rule prevailing in the great majority of the 50 states. See, *e.g.*, *Hensler v. City of Glendale*, 8 Cal.4th 1, 15 (1994). Accordingly, the Ninth Circuit's rule would promote forum shopping between the federal and state courts.

306-07 (4th Cir. 1973). Yet, as demonstrated above, the unanimous and long-standing rule of this Court precludes juries in direct condemnation cases under the Fifth Amendment. As this Court stated in *Atlas Roofing Co.*: "The point is that the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases." 430 U.S. at 460. The latter reason also is not relevant to whether the liability issue should be decided by a jury; courts have consistently treated liability for inverse condemnation differently from damages.<sup>4</sup>

The Ninth Circuit also found a right to a jury because inverse condemnation actions are actions "at law" rather than suits "in equity." App. 7-9. This logic fails. Direct condemnation is also a right at law; it is not a right in equity, nor a creature of statute. *Atlas Roofing Co.*, 30 U.S. at 458, citing *Kohl v. United States*, 91 U.S. 367, 375-76 (1876) (Judiciary Act of 1789 conferred upon circuit courts jurisdiction over condemnation actions). Yet, direct condemnation claims have never included a right to jury trial. *Id.*

#### **B. Section 1983 Does Not Create A Right To A Jury.**

The Ninth Circuit erroneously assumed that Del Monte was entitled to a jury trial because Del Monte brought its inverse condemnation action under 42 U.S.C.

<sup>4</sup> If a court finds that the government is liable for inverse condemnation, a jury determines just compensation. See *infra* p. 5 and footnote 2.

Section 1983. App. 7-10. The Ninth Circuit's reliance on Section 1983 is misplaced.

In general, a jury is available in an action brought under Section 1983 if the plaintiff seeks money damages. See, e.g., *Perez-Serrano v. DeLeon-Velez*, 868 F.2d 30, 32 (1st Cir. 1989) (in unlawful discharge case, "where damages and injunctive relief are sought under § 1983, liability is for the jury."). However, among the rights enumerated in the Constitution, the Takings Clause is uniquely "self-executing." See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. at 315. "[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking." *Id.* Unlike other claims for damages arising under the Constitution, the Takings Clause provides its own monetary remedy, "just compensation," obviating a remedy under Section 1983. See also *Molina v. Richardson*, 578 F.2d 846, 853 n.14 (9th Cir. 1978) ("The Fifth Amendment's explicit requirement that compensation be paid for such takings is, of course, an important factor distinguishing such actions. . . .").<sup>5</sup>

This Court has regarded Section 1983 as creating a remedy for "constitutional torts." See *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978). But whether a jury is available in an action brought under Section 1983 turns on whether a jury is available for infringement of the underlying constitutional right. See

<sup>5</sup> But see *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) (relying on non-takings cases, finding that takings claims against municipalities under Fifth Amendment must be brought under 42 U.S.C. § 1983).



*Albright v. Oliver*, 510 U.S. 266, 271 (1994), citing *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) and *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (Section 1983 purely a remedy for violation of other federal rights; Section 1983 not a source of substantive rights); see also *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1979) (Civil Rights Act of 1871 provides merely a remedy, not any substantive rights); but see *Cook v. Cox*, 357 F. Supp. 120, 123 (E.D. Va. 1973) (Section 1983 creates separate federal right that implicates right to jury trial). As demonstrated above, there is no constitutional right to a jury in a takings case. Section 1983 does not create such a right here.

The Ninth Circuit relied on *Lorillard v. Pons*, 434 U.S. 575 (1978) for the proposition that Section 1983 confers a right to a jury. App. 7. However, in *Lorillard*, the underlying right the plaintiff sought to enforce originated with the Age Discrimination in Employment Act of 1967 (ADEA). 29 U.S.C. §§ 621 *et seq.* This Court found that in creating a new legal right under the ADEA, Congress intended to incorporate the right to a jury trial that existed for enforcement of similar federal statutes as of 1967. 434 U.S. at 581, 584.<sup>6</sup>

In finding that a jury is available in an inverse condemnation case under Section 1983, the Ninth Circuit also

<sup>6</sup> The predecessor statute to Section 1983 was enacted in 1871. At the time of its enactment, there was no right to a jury trial for condemnation actions because there was no right to a jury trial for such actions in 1791. See *supra* at pp. 7-8. The mere enactment of Section 1983 did not create the right to a jury trial for claims for which no such right existed in 1871.

misconstrued a takings action as a type of common-law tort, such as trespass. App. 9. The Ninth Circuit relied on *Beatty v. United States*, 203 F. 620, 626 (4th Cir. 1913), writ of error dismissed and cert. denied, 232 U.S. 463 (1914) (appeal denied because order not final), for the proposition that inverse condemnation is similar to trespass. However, *Beatty* was overruled in *21.54 Acres of Land*, 491 F.2d at 306-07 (trial judge had jurisdiction to find facts relative to takings claim) and *Atlantic Seaboard Corp. v. Van Sterkenburg*, 318 F.2d 455, 459 (4th Cir. 1963) ("there is no absolute right to a jury trial on the issue of compensation").

An inverse condemnation claim is not analogous to common-law torts like trespass. In cases of trespass and other common-law torts, the plaintiff sues the defendant for damages for a wrong committed by the defendant. In contrast, under the Takings Clause, the taking is not considered a wrong or an injury as long as the government pays compensation. See *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). The framers intended the Takings Clause only to apportion the burdens of public projects between the individual and the public as a whole. *Agins v. City of Tiburon*, 447 U.S. at 260 (taking is determination that public at large rather than single owner must bear burden of state's action); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (Takings Clause designed to bar Government from forcing some alone to bear public burdens); *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945) (Takings Clause redistributes economic losses inflicted by public improvements so they fall upon public rather than individual property owners). The Ninth's Circuit's

attempt to analogize "takings" cases to common-law torts cannot work.

Significantly, reliance on Section 1983 for a right to a jury in inverse condemnation would produce anomalous results. First, as shown above, both direct and inverse condemnation claims arise directly out of the Takings Clause of the Fifth Amendment. *See supra* at pp. 6-8. It is settled that direct condemnation does not require a trial by jury. It would be incongruous to require liability issues in direct condemnation to be tried by a judge, and simultaneously allow liability for inverse condemnation to be tried to a jury.

Second, a property owner cannot sue a state under Section 1983. *Arizonans for Official English v. Arizona*, \_\_\_ U.S. \_\_\_, 117 S.Ct. 1055, 1069, 137 L.Ed.2d 170 (1997); *Quern v. Jordan*, 440 U.S. 332, 338-41 (1979). Actions for inverse condemnation against a state government are brought directly under the Fifth Amendment. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1006 (1992). Accordingly, under the Ninth Circuit's rule, a property owner would have a constitutional right to a jury in an inverse condemnation case in federal court against a local public entity, *see Monell v. Dept. of Social Services*, 436 U.S. at 690, but not against a state.

## II. HEIGHTENED SCRUTINY APPLIES ONLY TO REGULATION WHERE THE GOVERNMENT REQUIRES THE DEDICATION OF A POSSESSORY INTEREST IN LAND AS A CONDITION OF APPROVAL.

### A. Like Other Social And Economic Regulation, Land Use Regulation Has Traditionally Enjoyed A Presumption Of Validity.

Since the New Deal, this Court has consistently applied the lowest level of scrutiny to determine whether social and economic regulation advances a legitimate government interest. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938); *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 377 (1991) ("determination of 'the public interest' in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, and [*Parker v. Brown*, 317 U.S. 341 (1943)] was not meant to shift that judgment from elected officials to judges and juries"); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (legislative acts adjusting burdens and benefits of economic life presumed constitutional; burden is on one complaining of constitutional violation to establish that regulation is arbitrary and irrational).<sup>7</sup>

<sup>7</sup> In *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994), this Court made clear that heightened scrutiny applies only to adjudicatory decisions relating to specific permit applications, rather than legislative regulation. However, it is unclear from the Ninth Circuit's decision whether, in extending heightened scrutiny to decisions involving no exaction, the panel intended to limit such scrutiny to adjudicatory actions. Disappointed permit applicants will no doubt argue that heightened scrutiny



Generally, courts review land use regulation like other economic and social legislation, applying the deferential "rational basis" test. *See, e.g., Euclid*, 272 U.S. at 388 (if validity of legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control); *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927) (court will not substitute its judgment for that of legislative body charged with primary duty to determine the question); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (court does not sit to determine whether particular housing project is or is not desirable); *Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) ("The Courts of Appeals were not created to be 'the Grand Mufti of local zoning boards'"); *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 828-29 (4th Cir. 1995) ("Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts"); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) (heightened scrutiny "limited to the context of development exactions where there is a physical taking or its equivalent."). Under this test, the

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applies to legislative land use regulations as well. *See, e.g., Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) (Thomas, J., dissenting, arguing that heightened scrutiny should apply to legislative conditions of development of real estate). For this reason, San Francisco and amici cities will assume for purposes of argument here that the Ninth Circuit's decision applies to legislative zoning regulations.

courts presume that the government's decision is supported by the facts. The courts must uphold such regulation unless no reason can be conceived to support it. *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1973); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-96 (1962). The burden is on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *see also Pennell v. San Jose*, 485 U.S. 1 (1988) (ordinance to control rents upheld); *Agins v. City of Tiburon*, 447 U.S. at 261-62 (zoning to prevent ill effects of urbanization upheld); *Penn Central Transp. Co. v. New York City*, 438 U.S. 110, 129-30 (1978) (landmark preservation law upheld as valid exercise of police power); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413 (great weight given to judgment of legislature).<sup>8</sup>

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<sup>8</sup> Notably, the Ninth Circuit's radical expansion of the federal courts' power to make land use policy in *Del Monte Dunes* is at odds with other decisions of that Circuit. The Ninth Circuit has been at the forefront of the federal courts recognizing that the federal judiciary should only intervene in local zoning disputes in cases of clear abuses of power. *See, e.g., Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455 (9th Cir. 1987) (constitutional claims not ripe because city had not made final decision regarding acceptable uses); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 409-10 (9th Cir. 1996), *cert. denied*, \_\_\_ U.S. \_\_\_, 118 S.Ct. 1386, 140 L.Ed.2d 646 (1998) (district court should refrain from addressing federal facial taking claim under *Pullman* abstention doctrine); *Commercial Builders of Northern California v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992) (upholding impact fee imposed on commercial development for construction of housing); *Dodd v. Hood River County*, 136 F.3d at 1225 (deferring to state's judgment in denying building permit).

The rational basis test is firmly rooted in the doctrine of separation of powers between the legislative and administrative branches of government and the judicial branch. *Penn Central*, 438 U.S. at 125; *Gorrie v. Fox*, 274 U.S. 603, 608 (1926). The Constitution vests the legislative and executive branches with the authority to make social and economic policy.

As this Court has consistently recognized in cases involving the powers of the other branches, the Constitution limits the role of the judiciary to restraining the arbitrary exercise of legislative and administrative authority. The Takings Clause is one such limit. A public agency is liable for a regulatory taking of private property *only* where the regulation "goes too far." *Pennsylvania Coal*, 260 U.S. at 415; *First English*, 482 U.S. at 316.

**B. This Court Has Limited Heightened Scrutiny To The Special Class Of Land Use Regulation Cases Where Government Requires A Dedication Of Property As A Condition Of Project Approval.**

In changing the standard of judicial review of discretionary decisions affecting land use, the Ninth Circuit has strayed far from this Court's precedent. In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the Court developed the "essential nexus" takings test. 483 U.S. at 837. In order to condition approval of a land use development on the transfer of a possessory interest in land to the public, known as an "exaction," a governmental entity must show that the transfer "substantially advances a legitimate state interest." *Id.* at 834-37.

The phrase "substantially advances a legitimate state interest" in the context of exactions means that a condition must "serve[ ] the same governmental purpose as [a] development ban." *Id.* at 837. The essential nexus test also shifts to the government the burden of justifying the exaction. *Id.* at 836; *Dolan*, 512 U.S. at 391 n.8. In contrast, where the government merely regulates land use, the property owner still bears the burden of demonstrating that a regulation effects a taking. *Id.*

In *Dolan*, this Court answered "a question left open" by *Nollan*. 512 U.S. at 377. The Court quantified the *degree* of the nexus required by *Nollan* between the impact of a development project and a mitigating condition. The essential nexus test requires "rough proportionality." *Id.* at 391. Both *Nollan* and *Dolan*, however, made clear that the "essential nexus" and "rough proportionality" tests – collectively referred to as "heightened scrutiny" – apply *only* where the government has required dedications of a possessory interest in land as a condition of approval.

The *Nollan* Court found that permit conditions exacting an interest in real property resembled a physical taking. 483 U.S. at 831. The Court further acknowledged that governmentally required dedication of land as a condition of development is entirely different from classic regulation of land use. *See id.* at 834-35 (citing cases involving land use regulation for the proposition that "a broad range of governmental purposes and regulations" of land use have been upheld). Justice Scalia concluded his opinion by highlighting the distinction between use restrictions and required dedications of possessory interests:



We are inclined to be particularly careful about the adjective ["substantial"] where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

*Id.* at 841 (emphasis added).

Thus, heightened scrutiny has its origins in the narrow class of regulation of adjudicatory exactions on individual permit applications allowing the physical invasion by the public of private property. In *Nollan* and *Dolan*, this Court held that heightened judicial scrutiny of this special group of cases is necessary to guard against government's "leveraging" the police power. The Court was concerned about the potential abuses of governmental power where the government imposes a condition on development that allows the government to acquire an interest in property on behalf of the public, but where the dedication of the property to the public does not bear a close relationship to the impact of the proposed project.

*Dolan* underscored the distinction between pure land use regulation and conditions requiring the dedication of a possessory interest in land. Chief Justice Rehnquist emphasized that the exaction in question compromised *Dolan's* "right to exclude others," which is "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" 512 U.S. at 384, quoting from *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); see also *Dolan*, 512 U.S. at 393. The Chief Justice defined the scope of the holdings in *Nollan* and *Dolan* as follows:

The sort of land use regulations discussed in the cases just cited [*Euclid*, *Pennsylvania Coal*, and *Agins*], . . . differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.

512 U.S. at 385.

Even in his dissent in *Dolan*, Justice Stevens pointed out that *Nollan's* "essential nexus" test and *Dolan's* "rough proportionality" test apply only to conditions requiring the dedication of an interest in land: "The Court has decided to apply its heightened scrutiny to a single strand – the power to exclude. . . ." *Dolan*, 512 U.S. at 409 (Stevens, J., dissenting). Plainly, a government's ordinary regulation of land use does not implicate the power to exclude and does not trigger heightened judicial scrutiny.

In the case of *Del Monte*, Monterey did not require an actual conveyance of property. Nor did the government impose a condition on the approval of a permit. Rather, this case involves ordinary regulation of land use in the form of a denial of a permit. This case does not raise the special concerns that prompted the formulation of *Nollan/Dolan* heightened scrutiny, namely, leveraging of

the police power to acquire an interest in land. Accordingly, the Ninth Circuit erroneously applied heightened scrutiny.<sup>9</sup>

**C. Shifting Authority For Land Use Regulatory Policy To The Courts Would Undermine Fundamental Principles Of Political Accountability.**

Expansion of heightened scrutiny to all land use regulations adopted by legislative and administrative agencies would frustrate our most basic democratic traditions. In *Sylvia Development Corp. v. Calvert County*, 48 F.3d 810, the Fourth Circuit described the essentially political nature of land use planning:

Zoning is inescapably a political function. Indeed, it is the very essence of elected zoning officials' responsibility to mediate between developers, residents, commercial interests, and those who oppose and support growth and

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<sup>9</sup> Land use regulation effects a taking where the regulation either: (1) fails to substantially advance a legitimate government interest, or (2) denies the property owner economically viable use of his land. *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1016. This Court first referred to the first prong of the takings test, that land use regulation must "substantially advance a legitimate government interest," in *Agins*, 447 U.S. at 260. In establishing this standard, the *Agins* Court relied on a substantive due process case, *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1927). *Agins*, 447 U.S. at 260. Accordingly, the "substantially advances" standard had its origins in the doctrine of substantive due process. In takings cases not involving exactions of a possessory interest in land, therefore, the same deferential standard of judicial review that applies to substantive due process cases – namely, the rational basis test – should apply.

development in the community. . . . [L]and-use decisions are a core function of local government. . . . Federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes.

48 F.3d at 828, quoting *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 67-68 (4th Cir. 1992). Local land use planning "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983), quoting *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 498 (1941).

The elected representatives serving on amici's city councils and boards of supervisors are accountable to their constituents for the zoning and land use ordinances that these elected officials enact. These elective bodies, and the boards and commissions appointed by these bodies that administratively apply the zoning ordinances and general plans to individual permits, are also accountable to the people. Indeed, administrative and legislative proceedings where these policies are considered and applied provide an essential forum for members of the public affected by a development project to express their views to their elected representatives.

Critically, the universal application of heightened scrutiny ~~proposed by the~~ Ninth Circuit would take the authority over land use policy traditionally vested in elected bodies and place ultimate power in the hands of judges and juries. The effect would be to deny a meaningful voice in matters that have direct and immediate impact on their property values, safety, economic welfare,



and quality of life. The framers of the Constitution could not possibly have intended this result.

**D. Transferring Authority For Land Use Policy To The Courts Would Cripple The Ability Of Local Government To Engage In Land Use Planning.**

The transfer of authority over land use policy to the courts that would result if the Ninth Circuit's decision is upheld would not only undermine basic principles of accountability, but would also devastate the existing system by which local governments endeavor to make our communities safe, clean, well-planned, and attractive, thereby helping to make our businesses competitive. Several examples illustrate the point.

First, in Silicon Valley, located on the Peninsula south of San Francisco, industrial success has been accompanied by complex problems, such as a shortage of housing, congested traffic, and other environmental hazards. See JOINT VENTURE SILICON VALLEY NETWORK, BENCHMARKING SILICON VALLEY'S ECONOMIC VITALITY AND QUALITY OF LIFE (1997).<sup>10</sup> These ills threaten to stifle job growth and reduce prosperity for people in the San Francisco Bay

<sup>10</sup> The vision of Joint Venture Silicon Valley is "to build a community collaborating to compete globally." PAMPHLET, JOINT VENTURE SILICON VALLEY (1996) ("*JVSV Pamphlet*") at 1. Joint Venture Silicon Valley is comprised of CEO's from high-technology firms and the construction industry, government, education and the community "who have joined together to act on regional issues affecting economic vitality and quality of life." *Id.*

Area. As the Joint Venture Silicon Valley Network has reported, the "affordability, variety, and location of housing affect a region's ability to maintain a viable economy . . .," "[c]ongested roads reduce productivity," and the "availability of public transit . . . provides non-auto workers access to job opportunities." *Id.* at 16, 19; see also PRESS RELEASE, ASSOCIATION OF BAY AREA GOVERNMENTS (ABAG) Dec. 11, 1997, at 4 ("High housing prices and production of [affordable] housing will remain the most serious constraint to the economic health of the region"); BAY AREA FUTURES, ABAG STUDY FOR SAN FRANCISCO DISTRICT COUNCIL AND URBAN LAND INSTITUTE (Nov. 1997) at 38 (long commutes and lack of access to mass transit threaten economic vitality of region), 41 (Bay Area traffic forecast appears "grim").

In reaction to these social problems, the region has developed strategic plans to manage growth, while simultaneously achieving a balance between the rights of property owners and the interests of the community. These solutions require the coordination of governmental agencies throughout the region.

Under existing California law, a development project that would increase traffic congestion in Silicon Valley would require an environmental impact report and undergo a series of public hearings. In this public review process, planners with experience and expertise in the transportation issues raised by the project would study the project and make recommendations to the decision-maker, such as a planning commission or city council. With input from the public, the decision-maker would review the project for harmony with local and regional

zoning ordinances and transportation plans. If the project is inconsistent with these ordinances and plans, the decision-maker could disapprove the project or condition approval on the developer's mitigation of the harmful impacts of the project on the region's transportation systems.

However, under the expansion of heightened scrutiny mandated by the Ninth Circuit, once this administrative process is completed, the developer could challenge a denial of the project or any condition imposed on the project by filing a takings claim in court. The court's review of the project would be essentially *de novo*. The decisions made by planning commissions and city councils – decision-makers committed to enforcing local and regional planning and zoning laws, and who have reviewed a thorough study of the proposed project for compliance with policies adopted by democratically elected officials – would be entitled to no deference. Instead, a judge or lay jury without experience in local planning and zoning matters would have the final say on the project.

These judges and juries do not report their decisions to the citizens of Silicon Valley affected by the project.<sup>11</sup> Under heightened scrutiny, judicial decision-makers

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<sup>11</sup> In the case of Del Monte Dunes, jurors deciding the fate of property in the City of Monterey could be drawn from as far away as Ukiah in Mendocino County – 200 miles away. The views of such persons having no familiarity with the Monterey Coast would thus become a more significant factor in the decision ultimately to approve or disapprove the development than all of the various local and regional plans, local and state zoning ordinances, and applicable case law.

would be free to re-weigh the evidence and substitute their own, subjective views as to the advantages and disadvantages of the project, giving no deference to the exhaustive public review process. Decisions about land-use and transportation planning would be made on an *ad hoc* basis by different decision-makers in every case. Because the subjective views of a judge or jury would be the ultimate determinant of land use regulation, consistency and predictability in community planning would be lost.<sup>12</sup> Moreover, a judge or jury sitting in review of a single development project is not apt to apply the broader perspective necessary to achieve solutions to regional problems.

A second example involves the ability of local communities to restrict adult businesses to districts that are removed from schools, churches, and other business catering to children and families – one of the quintessential prerogatives of local governments. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986) (cities may regulate adult theaters through zoning by dispersing or concentrating them); *Miller v. California*, 413 U.S. 15 (1973) (standard for definition of pornography is contemporary local community standard). Under a system in which heightened scrutiny were universally applicable, courts would no longer defer to the decisions of elected public officials over policies for siting adult businesses.

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<sup>12</sup> One of the primary objectives of Joint Venture Silicon Valley is to "[p]romote[ ] consistency and simplification of the regulatory and permitting processes in Silicon Valley." *JVSC Pamphlet* at 2.



As a third example, the rule adopted by the Ninth Circuit would subject zoning ordinances setting height limits, set-backs, side-yards, off-street parking, and seismic safety to general attack. Under heightened scrutiny, the government would be required to make an individualized showing for each restriction on each building permit application that the regulation was justified to avoid a social harm in that particular case. Moreover, judges and juries would be free to substitute their own judgment for that of the administrative or legislative agency as to the basic policy underlying a land use regulation. Virtually all planning and zoning would be vulnerable to challenge as a taking.

In sum, the expansion of heightened scrutiny would threaten the separation of powers between the administrative and legislative branches of government and the judicial branch, undermine our democratic system with respect to regulation of land use, and cripple the efforts of government to plan our communities. As this Court intended in deciding *Nollan* and *Dolan*, heightened scrutiny should be limited to the narrow, special class of adjudicatory exactions involving a possessory interest in land.

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## CONCLUSION

The decision of the Ninth Circuit should be reversed.

Dated: June 4, 1998

Respectfully submitted,

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JUN 4 1998

CLERK

No. 97-1235

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1997

CITY OF MONTEREY,  
v. *Petitioner,*  
DEL MONTE DUNES AT MONTEREY, LTD. and  
MONTEREY-DEL MONTE DUNES CORPORATION,  
*Respondents.*

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MANAGEMENT ASSOCIATION, AND  
INTERNATIONAL MUNICIPAL  
LAWYERS ASSOCIATION  
AS *AMICI CURIAE* SUPPORTING PETITIONER

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33 PP



**QUESTION PRESENTED**

*Amici* will address the following question:

Whether there is a right to a jury trial on a regulatory takings/inverse condemnation claim brought in federal court under 42 U.S.C. § 1983.

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INTERNATIONAL MUNICIPAL  
LAWYERS ASSOCIATION  
AS *AMICI CURIAE* SUPPORTING PETITIONER

INTEREST OF THE *AMICI CURIAE*

*Amici*, organizations whose members include state, county and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local gov-



ernments. One of the principal functions of state and local governments is land use regulation. The procedures used in judicial challenges to land use decisions are thus of fundamental importance to *amici* and their members.

The court of appeals' holding that a jury properly decided the City of Monterey's liability for a regulatory taking is a serious error that is contradicted by hundreds of years of practice and precedent. As one authority explained shortly after the enactment of 42 U.S.C. § 1983, "[c]ondemnation is not an action at law, but an inquisition on the part of the state for the ascertainment of a particular fact, and may be conducted without the intervention of a jury." Henry E. Mills, *A Treatise Upon The Law Of Eminent Domain* § 91, at 121 (1879). The court of appeals' additional holding that the district court properly submitted to the jury the question of whether the city's actions substantially advanced a legitimate government interest reflects a fundamental misunderstanding of the role of courts in reviewing the actions of state and local legislative and administrative bodies.

Because of the importance of these issues to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.<sup>1</sup>

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<sup>1</sup> The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

### SUMMARY OF ARGUMENT

A. Regulatory takings/inverse condemnation claims, like eminent domain claims, are not actions at law in which there is a right to a jury trial. "Condemnation is not an action at law, but an inquisition on the part of the state for the ascertainment of a particular fact, and may be conducted without the intervention of a jury." Henry E. Mills, *A Treatise Upon The Law Of Eminent Domain* § 91, at 121 (1879). Such proceedings derive from the writ *ad quod damnum*, which was issued by courts of equity to the sheriff to conduct an inquest into the amount of damages incurred by a landowner as a result of a taking.

It has thus long been the rule that there is no right, in the absence of statute, to a jury trial in an eminent domain action. This rule applies to the determination of both liability and damages. Moreover, it applies regardless of whether the condemning authority is a sovereign or a non-government entity such as a railroad or utility that has been granted eminent domain powers.

The similarities between eminent domain and inverse condemnations actions compel the conclusion that there is no right to a jury trial on a regulatory takings claim. The right to bring a regulatory takings claim is "based on the right to recover just compensation for property taken by the [sovereign] for public use in the exercise of its power of eminent domain. . . . The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners [does] not change the essential nature of the claim." *First English Evan. Luth. Church v. Los Angeles Cty.*, 482 U.S. 304, 315 (1987) (citation omitted).

Inverse condemnation actions have traditionally sought such equitable relief as compelling the government to condemn the property or enjoining the enforcement of police power regulations. And an inverse condemnation action which seeks monetary relief for a temporary taking bears a strong resemblance to the equitable remedies of restitution and accounting for rents. There is, of course, no right to a jury trial in these equitable proceedings. Whether the proceeding is initiated by the condemnor or landowner does not alter its fundamental nature, which is not an action at law, but a special proceeding of equitable origin in which the court has a duty to see that the estimates made "are just, not merely to the individual whose property is taken, but also to the public, which is to pay for it." *Searl v. School Dist. No. 2*, 133 U.S. 553, 562 (1890).

B. The court of appeals erred in concluding that the question of whether "the City's actions substantially advanced a legitimate public purpose" is so "essentially factual" that it should be decided by a jury. The court's conclusion demonstrates a fundamental misunderstanding of the relative roles of courts and juries in constitutional adjudication.

Contrary to the court's reasoning, this question embraces a predictive judgment about the efficacy of the government's chosen means of achieving a particular end. The Constitution commits these judgments to legislative and administrative bodies, as this Court's cases have long made clear. As the Court has explained, "neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted" for the legislature's judgment. *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938). The deferential standards of review

which courts apply in reviewing administrative action likewise demonstrate that juries have no role in assessing the validity of these predictive judgments.

The Court's cases interpreting the Takings Clause's "public use" requirement reinforce the conclusion that juries have no role in assessing whether a land use regulation substantially advances a legitimate government purpose. "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). If courts are not to engage in "empirical debates over the wisdom of takings," *id.* at 243, juries should not be empowered to engage in empirical debates over the efficacy of land use regulations.

#### ARGUMENT

#### THERE IS NO RIGHT TO A JURY TRIAL ON A REGULATORY TAKINGS/INVERSE CONDEMNATION CLAIM BROUGHT IN FEDERAL COURT UNDER 42 U.S.C. § 1983

The court of appeals erroneously held that the district court properly submitted to the jury the issue of whether the City was liable for a regulatory taking of Del Monte's property. The court's holding that Del Monte was entitled to a jury trial on its regulatory taking/inverse condemnation claim because "plaintiffs who bring an action at law under Section 1983 have the right to a jury trial," Pet. App. 7a-8a, rests on two flawed premises—that an inverse condemnation claim is an action at law, and that the nature of the remedy sought dictates whether the issue of liability is to be decided by a common law jury.

As explained below, there is no right to a jury trial in the analogous eminent domain proceeding. Con-



trary to the reasoning of the court of appeals, this rule is not the consequence of the United States' sovereign immunity. Rather, it is the result of the long-standing recognition that such cases, which derive from the equitable writ *ad quod damnum*, are "of a special and peculiar nature," *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959), and are not cases in which trial by jury is a matter of right. Courts have thus denied jury trials not only when the United States has been a party but also when such non-governmental entities as utility companies have exercised the power of eminent domain.

Nor was the court of appeals on any firmer ground in reasoning that Del Monte was entitled to a jury trial because it sought as relief "compensatory or 'legal' damages." Pet. App. 9a. To the extent this is even relevant in assessing whether the issue of liability in a regulatory takings case is for the jury, a long tradition exists of courts assigning the task of determining the adequacy of compensation to bodies other than the common law jury. Moreover, in eminent domain proceedings, courts, rather than juries, have long determined such questions as whether a taking is for a public purpose, an issue which is analogous to the question of liability in a regulatory takings action. The judgment of the court of appeals should therefore be reversed.

#### A. Eminent Domain And Regulatory Takings/Inverse Condemnation Claims Are Not Actions At Law

1. The court of appeals correctly observed that 42 U.S.C. § 1983 "is silent with respect to whether plaintiffs have a right to a jury trial in actions brought pursuant to it." Pet. App. 7a. The court reasoned that because Section 1983's text "[m]irror[s] the split

then existing between courts of law (trial by jury) and courts of equity (bench trial)," and "section 1983 gives aggrieved parties the right to bring an 'action at law' or a 'suit in equity,'" it "logically" follows that "plaintiffs who bring an action at law under section 1983 have the right to a jury trial." *Id.* at 7a-8a.

Contrary to the court of appeals' reasoning, Section 1983 does not provide aggrieved parties with only the remedies of "an action at law" or "suit in equity." 42 U.S.C. § 1983. Rather, it provides the remedies of "an action at law, suit in equity, or other proper proceeding for redress." *Id.* (emphasis added). The inevitable consequence of the court's ignoring the existence of this third category of remedies was its conclusion that eminent domain and inverse condemnation actions must be actions at law which are triable to a jury because property owners customarily seek monetary relief. *See* Pet. App. 9a. The court of appeals' holding ignores the history and accepted understanding of the nature of eminent domain proceedings and two centuries of practice to the contrary.

This Court has recognized that "[a]lthough an eminent domain proceeding is deemed for certain purposes of legal classification a 'suit at common law,' it is of a special and peculiar nature." *Thibodaux*, 360 U.S. at 28 (quoting *Kohl v. United States*, 91 U.S. 367, 375-76 (1875)). Indeed, as a leading authority explained shortly after the enactment of Section 1983, eminent domain proceedings derive from the writ *ad quod damnum*, which was issued by courts of equity to the sheriff to conduct an inquest into the amount of damages incurred by a landowner as a result of a taking. *See* Henry E. Mills, *A Treatise Upon The Law Of Eminent Domain* § 84, at 111 (1879); *see also* 2 Nichols, *The Law Of Eminent*

*Domain* § 4.105[1], at 4-107 (Julius L. Sackman ed., rev. 3d ed. 1990); 6 *id.* § 24.06[1], at 24-28 - 24-29 ("The statutory system of condemnation by judicial decree prevailing in the great majority of states has grown and developed out of the early *ad quod damnum* proceedings. . ."); *Custiss v. Georgetown and Alexandria Turnpike Co.*, 10 U.S. (6 Cranch) 233 (1810); *Lewis v. Du Pont*, 22 A.2d 832, 834 (Del. Super. Ct. 1941); *Lake Bowling Alley v. City of Richmond*, 82 S.E. 97, 99 (Va. 1914); *Jacksonville, T. & K. W. Ry. Co. v. Adams*, 11 So. 169, 171 (Fla. 1982).<sup>2</sup> That issuance of this writ was the province of courts of equity belies the Ninth Circuit's suggestion, Pet. App. 8a, that eminent domain proceedings "are actions at law."<sup>3</sup>

Rather, eminent domain proceedings "are special proceedings for the exercise of public powers." Carman F. Randolph, *The Law Of Eminent Domain In*

<sup>2</sup> See also 1 Nichols, *Eminent Domain* § 1.22[1], at 1-78—1-79 ("[I]t is apparent that the whole system of exercising eminent domain in the American colonies was influenced to a considerable extent by the English practice of inquest by a jury, and in many colonies the writ of *ad quod damnum* was used, *eo nomine*, and continued to be so used long after the Revolution.").

Inquest juries are not the same as common law juries and are not subject to the same rules as common law juries. See *Bauman v. Ross*, 167 U.S. 549, 592-93 (1897); see also *Hamer v. School Bd.*, 393 S.E.2d 623, 627 (Va. 1990); *Baltimore Belt R.R. Co. v. Baltzell*, 75 Md. 94, 106-08 (1891); *Beekman v. Saratoga & Schenectady R.R. Co.*, 3 Paige Ch. 45, 75-76 (N.Y. Ch. 1831).

<sup>3</sup> The *Kohl* opinion states that "[t]he right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute." 91 U.S. at 376. The *Kohl* dictum cites no authority for this statement, which is at odds with the numerous authorities cited above.

*The United States* § 314, at 288 (1894). "Condemnation is not an action at law, but an inquisition on the part of the state for the ascertainment of a particular fact, and may be conducted without the intervention of a jury." Mills, *Eminent Domain* § 91, at 121. This is so, as the Court has explained, because "[i]t is the duty of the state to see that the estimates made are just, not merely to the individual whose property is taken, but also to the public, which is to pay for it." *Searl v. School Dist. No. 2*, 133 U.S. 553, 562 (1890); see also Mills, *Eminent Domain* § 84, at 111 (citing *Garrison v. New York*, 88 U.S. (21 Wall.) 196 (1874)).

It has thus long been the rule that

the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury, but may be entrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury.

*Bauman*, 167 U.S. at 593. See also II James Kent, *Commentaries on American Law* \*339 note e (O. W. Holmes, Jr. ed., 12th ed. 1873) ("The damages may be assessed in any equitable and fair mode, to be provided by law, without the intervention of a jury, inasmuch as trial by jury is only required on issues of fact, in civil and criminal cases in courts of justice."); Mills, *Eminent Domain* § 85, at 112-13 (value of property can be assessed by "a jury, or commissioners, or [a] court without a jury"); 6 Nichols, *Eminent Domain* § 24.06, at 24-27 ("the amount of compensation to which each owner is entitled is determined by commissioners or by a jury as



the local constitution or statute requires") (footnote omitted). *Cf. Custiss*, 10 U.S. (6 Cranch) at 233 (describing early federal statute using writ *ad quod damnum*).

This remains the rule today. Thus, under Fed. R. Civ. P. 71A(h), "[i]f the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue." While in the absence of a "specially constituted tribunal any party may have a trial by jury of the issue of just compensation," the court may in its discretion order that "the issue of compensation shall be determined by a commission of three persons appointed by it." *Id.*; see also *United States v. Reynolds*, 397 U.S. 14, 18 (1970); Jacques B. Gelin & David W. Miller, *The Federal Law of Eminent Domain* 436-41 (1982). That to this day the federal rules allow for the issue of just compensation to be decided by bodies other than a common law jury demonstrates that eminent domain proceedings are not actions at law.<sup>4</sup>

<sup>4</sup> As one commentator observes, the early federal eminent domain statutes reflect a great "diversity in methods of assessment." Paxton Blair, "Federal Condemnation Proceedings And The Seventh Amendment," 41 Harv. L. Rev. 29, 37 (1927). Describing these statutes, Blair notes:

Thus we find, in close succession, provisions for assessment by a jury of twenty-three, by twelve freeholders, by not less than twelve jurymen out of a panel of twenty-four, and by not less than seven out of twelve, while we likewise find, all within the same decade, provisions in no less than four different statutes for reference of the assessment to three commissioners or a majority of them. *Id.* at 37 (footnotes omitted). He concludes that "the common law sanctioned such diverse methods of assessment that

As Mills further explained contemporaneously with the enactment of Section 1983:

The persons appointed to assess damages in cases of this kind do not perform the proper and usual functions of a jury . . . . Juries are for the trial of issues of fact in civil and criminal proceedings in courts of justice, and are not necessarily required in the assessment of land-damages. . . . The right to trial by jury is not claimed in equity cases, although rights of property are involved and issues of fact arise. Condemnation is not an action at law, but an inquisition on the part of the state for the ascertainment of a particular fact, and may be conducted without the intervention of a jury.

Mills, *Eminent Domain* § 91, at 120-21; see also II Kent, *Commentaries* at \*339 note *e*.

If juries are not constitutionally required to adjudicate the issue of just compensation in an eminent domain proceeding, it is even more remarkable to suggest they have a role in determining whether the government is liable for a taking in the first place. Notable in this regard is Federal Rule 71A(h), which further provides that the "[t]rial of all issues shall otherwise be by the court." Fed. R. Civ. P. 71A(h). The latter provision is in keeping with longstanding practice. Even when a party is entitled to trial by jury on the issue of just compensation, "[i]t is generally the province of the court to determine the preliminary questions of the right to condemn, whether the use is a public one, and the necessity of [the] taking." 20 *Corpus Juris Eminent Domain* § 381, at 974-75 (1920) (footnotes omitted). See also

no one method can be said to have been made imperative by the Seventh Amendment." *Id.* at 36.

Randolph, *Eminent Domain* § 322, at 294-95 (“A strict limitation usually imposed upon these tribunals is that they are not competent to pass upon questions of law. . . . A jury, whose sole duty is to assess compensation, [is] not competent to decide whether or not the construction of the undertaking is duly authorized.”)<sup>5</sup> As these authorities demonstrate, there is no right to a jury trial on liability issues in eminent domain proceedings and there is no basis to conclude that Section 1983 confers such a right.<sup>6</sup>

<sup>5</sup> A current statement of the rule is found in 27 Am. Jur. 2d *Eminent Domain* § 617, at 163-64 (1996) (footnotes omitted):

Generally, the court has the duty to determine such issues as the condemnor's legal authority to take and the limits thereon, the purpose of the taking, the necessity and expediency of the taking, and questions of title. Accordingly, a landowner has no constitutional right to be heard by a jury on the validity of a taking, as this issue presents a question of law for the court. Similarly, the landowner is not entitled to a jury determination of the public necessity of the proposed taking. The threshold question of liability for unreasonable or unlawful precondemnation conduct is to be determined by the court.

See also 2 Nichols, *Eminent Domain* § 4.105[5], at 4-119.

<sup>6</sup> The result is no different under the Seventh Amendment. As this Court has held:

“The practice in England and in the colonies prior to the adoption in 1791 of the Seventh Amendment, the position taken by Congress contemporaneously with, and subsequent to, the adoption of the Amendment, and the position taken by the Supreme Court and nearly all of the lower federal courts lead to the conclusion that there is no constitutional right to jury trial in the federal courts

2. The court of appeals ignored the extensive authority demonstrating that eminent domain proceedings derive from the equitable writ *ad quod damnum* and are special and unique proceedings rather than actions at law in which there is a right to a jury trial. Instead, the court asserted that eminent domain “proceedings are not tried before a jury because the United States traditionally is a party.” Pet. App. 8a (citing *KLK, Inc. v. U.S. Dep't of Interior*, 35 F.3d 454, 456 (9th Cir. 1994)). This is wrong for several reasons.

First, the court of appeals' assumption that the unavailability of a jury trial in eminent domain proceedings stems from sovereign immunity principles ignores that such principles do not control when the United States initiates a condemnation proceeding. Indeed, if the court of appeals is correct, then Rule 71A(h)'s provision that “if there is no [statute authorizing a] specially constituted tribunal any party may have a trial by jury of the issue of just compensation” would stand in contrast to the longstanding rule that only Congress can waive the United States' sovereign immunity. See, e.g., *Stanley v. Schwalby*, 162 U.S. 255 (1896); *Kendall v. United States*, 38 U.S. (12 Pet.) 524 (1838).<sup>7</sup>

in an action for the condemnation of property under the power of eminent domain.”

*Reynolds*, 397 U.S. at 18 (quoting 5 J. Moore, *Federal Practice* ¶ 38.32[1], at 239 (2d ed. 1969)). And as explained *infra*, both the similarities between—eminent domain and inverse condemnation proceedings and the nature of regulatory takings actions compel the conclusion that there is no right to a jury trial on liability issues in such proceedings.

<sup>7</sup> Indeed, it is settled that when the United States initiates a suit at common law the Seventh Amendment applies. See *Tull v. United States*, 481 U.S. 412, 420 (1987).



Second and most significantly, the court of appeals has ignored the long tradition of sovereigns granting the power of eminent domain to both municipal corporations and non-governmental entities such as railroads, highway companies, and utilities. Such entities do not enjoy sovereign immunity. See, e.g., *Lincoln County v. Luning*, 133 U.S. 529 (1890); cf. *Wilson v. United States*, 221 U.S. 361 (1910). Yet they frequently exercised the eminent domain power in proceedings in which there was no right to a jury trial. See *Alabama Power Co. v. 1354.02 Acres of Land*, 709 F.2d 666, 667-68 (11th Cir. 1983); *Georgia Power Co. v. 138.30 Acres of Land*, 596 F.2d 644, 647-50 (5th Cir. 1979); see also *Custiss v. Georgetown and Alexandria Turnpike Co.*, 10 U.S. (6 Cranch) at 233-34; *Baltimore Belt R.R. Co. v. Baltzell*, 75 Md. 94, 107 (1891) (noting that "as to railroads, the [Maryland] Legislature [has] without exception, provided that the compensation should be awarded by a special jury" summoned by warrant rather than a common law jury); *Bailey v. Philadelphia, Wilm. & Balt. R.R. Co.*, 4 Del. (4 Harr.) 389, 390-91 (1846); *Beekman v. Saratoga & Schenectady R.R. Co.*, 3 Paige Ch. 45, 75 (N.Y. Ch. 1831). As these authorities demonstrate, the reason eminent domain proceedings are tried without juries is not "because the United States [or some other sovereign] traditionally is a party." Pet. App. 8a. Rather, it is because eminent domain proceedings derive from the writ *ad quod damnum*, which was the province of courts of equity where there is no right to a jury trial.

3. The equitable pedigree of eminent domain proceedings demonstrates the court of appeals' error in reasoning that "the similarities between eminent do-

main and inverse condemnation suggest that the latter derives from common law." Pet. App. 9a. The court, however, syllogized that inverse condemnation suits are actions at law because they are similar to eminent domain proceedings, which "ha[ve] been characterized as a 'trespass committed by the sovereign,'" and "[a]ctions brought for trespass are common-law actions." *Id.* at 9a (quoting *Beatty v. United States*, 203 F. 620, 626 (4th Cir. 1913), *cert. denied*, 232 U.S. 463 (1914)).

The court's syllogism is correct only in its recognition that eminent domain and inverse condemnation proceedings are similar; indeed, its analysis ought to have stopped there. Moreover, the court's analogy to trespass actions ignores a critical difference between eminent domain proceedings and regulatory takings—that the common law action of trespass requires a physical invasion of the land which interferes with possession. See W. Page Keeton, *et al.*, *Prosser and Keeton on The Law Of Torts* § 13, at 67-73 (5th ed. 1984). While a physical invasion necessarily occurs when the power of eminent domain is exercised—it is, after all, the very point of exercising the power—no invasion occurs when the government merely regulates the use of land.<sup>8</sup>

The court's further assertion that "eminent domain and inverse condemnation actions resemble common-

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<sup>8</sup> The court of appeals' characterization of eminent domain proceedings as a "trespass by the sovereign" is contradicted by a leading commentator. See II Kent, *Commentaries* \*399 note j ("[I]t is not to be understood that a statute assuming private property for public purposes, without compensation, is absolutely void, so as to render all persons acting in execution of it trespassers.").

law actions for trover to recover damages for conversion of personal property, and detinue and replevin," Pet. App. 9a, is also incorrect. First, it is hard to understand how eminent domain proceedings resemble these actions given that the entity seeking to condemn property ordinarily initiates the proceeding.

Nor is the court's analogy any more persuasive with respect to inverse condemnation proceedings. Courts of equity have long exercised broad jurisdiction over disputes involving real property through such actions as a suit to quiet title and a suit for specific performance. See J. Moore, *Federal Practice* § 38.10[3][a][iii] (3d ed. 1998). Both of these equitable actions bear a far greater resemblance to inverse condemnation proceedings which assert that a land use regulation effects a taking of property than to common law actions involving chattels.

The purpose of most inverse condemnation actions is, after all, to compel the government either to condemn the property or to rescind a regulation. Compelling government action—whether it be to condemn property or to rescind a regulation—is typically obtained through the equitable remedy of an injunction. Moreover, as a practical matter, compelling the government to condemn property results in it becoming the owner of the property in return for paying compensation. In a dispute between private parties, such relief is traditionally obtained through a suit in equity for specific performance. And even an inverse condemnation action which seeks only monetary relief for a temporary taking bears a strong resemblance to the equitable remedies of restitution and accounting for rents. See I Joseph Story, *Commentaries On Equity Jurisprudence* 508-09 (12th ed.

1984); see also *Tull v. United States*, 481 U.S. at 424.

The court of appeals' suggestion that inverse condemnation actions "derive[] from [the] common law," Pet. App. 9a, is hard to square with the accepted understanding of the nature of these proceedings. As the Court itself has long recognized, the right to bring an inverse condemnation action is "based on the right to recover just compensation for property taken by the [sovereign] for public use in the exercise of its power of eminent domain. . . . The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim." *First English Evan. Luth. Church v. Los Angeles Cty.*, 482 U.S. 304, 315 (1987) (quoting *Jacobs v. United States*, 290 U.S. 13, 16 (1933)).

And as one treatise explains in describing the practice throughout the States:

'Inverse condemnation' is the popular description of the cause of action against a governmental defendant to recover value of property taken in fact by the defendant even though no formal exercise of the power of eminent domain has been attempted. The three methods by which the owners of real property seek to compel an assessment of damages in the same manner as in condemnation proceedings without resort to condemnation proceedings are by injunction, certiorari, and mandamus.

Irving L. Levey, *Condemnation in U.S.A.* § 44, at 455 (1969) (footnote omitted); see also 3 Nichols, *Eminent Domain* § 8.01[4][a], at 8-39 ("Traditionally, an [inverse condemnation] attack upon police power legislation sought merely declaratory relief by way



of an adjudication of invalidity, and equitable relief by way of an injunction against its enforcement, or both."); II Kent's *Commentaries* at \*339 note f ("if the government proceed without" providing compensation or a tribunal for assessing compensation, "their officers and agents may and ought to be restrained by injunction"); *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162, 166 (N.Y. Ch. 1816); cf. *Lewis v. Du Pont*, 22 A.2d at 834 (noting owner's remedy of writ *ad quod damnum*); *Bailey*, 4 Del. (4 Harr.) at 9 (same).

There is, of course, no right to a jury trial in these proceedings. And contrary to the reasoning of the court of appeals, the similarities between eminent domain and inverse condemnation actions suggest that whether the proceeding is initiated by the condemnor or the landowner does not alter the fundamental nature of the proceeding, which is not an action at law. Rather, it is a special proceeding of equitable origin in which the court has a duty to see that the estimates made "are just, not merely to the individual whose property is taken, but also to the public, which is to pay for it." *Searl v. School Dist. No. 2*, 133 U.S. 553, 562 (1890); see also *Mills, Eminent Domain* § 84, at 111 (citing *Garrison v. New York*, 88 U.S. (21 Wall.) 196 (1874)).

4. The court of appeals also reasoned that "Del Monte was entitled to have a jury try its inverse condemnation claim" because it asserted "legal rights" and sought "'legal' damages." Pet. App. 9a (citations omitted). But as explained above, it is hard to view the requirement of providing "just compensation" for taking property as a legal right or the compensation as legal damages when this right was tradi-

tionally enforced by seeking the equitable writ of *ad quod damnum*. That to this day there is no right to a jury trial in an eminent domain proceeding further demonstrates that the right to just compensation is equitable and not legal in nature. As a leading authority explains, "[w]hile an action seeking a monetary award will frequently be legal in nature, when a monetary claim is made in a context historically allowed in equity rather than at law, it will not be triable to a jury." J. Moore, *Federal Practice* § 38.10 [3][a][ii], at 38-45 (citations omitted).

**B. Whether A Land Use Regulation Substantially Advances A Legitimate Government Interest Is A Question Of Law Which Is Outside The Province Of The Jury**

The court of appeals also erred in concluding that the question of "whether the City's actions substantially advanced a legitimate public purpose," Pet. App. 12a, is so "essentially factual" that "it is the type of issue that can be put to the jury." *Id.* at 15a (citation omitted).<sup>9</sup> The court's conclusion demonstrates a fundamental misunderstanding of the relative roles of court and jury in constitutional adjudication which has grave implications for the review of the actions of state and local government legislative and administrative bodies.

1. The Court has said that the determination of whether "regulation goes too far" so as to be a taking, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), involves "'essentially ad hoc, factual inquiries.'" *Lucas v. South Carolina Coastal*

<sup>9</sup> *Amici* agree with petitioner's other *amici* that this is not the proper test for determining whether land use regulation effects a taking.

*Council*, 505 U.S. 1003, 1015 (1992) (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)). But, contrary to the view of the court of appeals, this language hardly “points . . . toward the use of the jury” to resolve the question of whether a government regulation substantially advances a legitimate government interest. To say that an inquiry is “essentially factual” does not address whether resolution of a particular prong of one of the Court’s formulations for determining whether a regulatory taking has occurred is factual in nature.

Nor does it answer the question of whether the “facts” necessary to resolve a particular inquiry are adjudicative in nature and thus must presumably be found by a jury. Cf. II Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 10.6, at 152-53 (1994) (discussing distinction between “adjudicative facts,” which are “‘facts concerning immediate parties,’” and “legislative facts,” which “‘are utilized for informing a court’s legislative judgment on questions of law and policy’”) (citation omitted). Indeed, this Court has a long tradition of taking judicial notice of legislative facts in constitutional litigation. See *id.* at 154-55; *United States v. Carolene Products Co.*, 304 U.S. 144, 153-54 (1938).

The court of appeals correctly noted that whether the government has a legitimate government purpose is “a legal determination.” Pet. App. 14a. The court went astray, however, in reasoning that the issue of whether “the City’s actions substantially advanced a legitimate state interest”—which it deemed to be a “reasonableness determination,” *id.*—was “essentially factual” and thus “the type of issue that can be put to the jury.” *Id.* at 15a.

The court’s conclusion that a jury is properly charged with the duty to assess the constitutional adequacy of the nexus between the means government has chosen and the end it seeks rests on several flawed premises. The first of these is that “the reasonableness issue in this case is essentially ‘fact-bound [in] nature.’” *Id.* (quoting *United States v. Moreno*, 742 F.2d 532, 537 (9th Cir. 1984) (Wallace, J., concurring)). *Moreno*, which involved the issue of whether an arrest was based on probable cause and thus “reasonable” under the Fourth Amendment, see 742 F.2d at 534-36, provides no authority for the court’s assertion.

Legal concepts such as reasonableness are terms of art which derive their meaning from context. Even in the realm of the Fourth Amendment, whether the issue of reasonableness is essentially legal or factual in nature cannot be answered without reference to its context. For example, the Court’s determination that it is unreasonable to shoot an unarmed, non-dangerous felony suspect—a determination which the Court made by “balanc[ing] the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion,” *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (citation omitted)—is indisputably a question of law which a jury is not competent to decide. Cf. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (“whether [secret service] agents acted reasonably under settled law in the circumstances” and are entitled to qualified immunity should be decided by the court and not a jury).

Indeed, whether the denial of a permit substantially advances (or as the lower courts put it, is reasonably



related to) the acknowledged governmental interests in "protecting the environment, preserving open space agriculture, protecting the health and safety of its citizens, and regulating the quality of the community," Pet. App. 13a (quoting district court's jury instructions), embraces a predictive judgment about the efficacy of the government's chosen means of achieving a particular end. Jurors bring no special expertise to this issue.<sup>10</sup> Rather, the Constitution commits these judgments to legislative and administrative bodies, as the Court made clear as early as *Pennsylvania Coal*:

One fact for consideration in determining [the] limits [of the police power] is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it is always open to interested parties to contend that the legislature has gone beyond its constitutional power.

<sup>10</sup> Among the stranger statements in the court of appeals' opinion is its assertion that "the reasonableness issue in this case . . . is founded largely 'on the application of the fact-finding tribunal's experience with the mainsprings of human conduct.'" Pet. App. 15a (quoting *Commissioner v. Duberstein*, 363 U.S. 278, 289 (1960)). The court's statement might be understandable if the jury had been instructed that it could disregard the City's assertions if it deemed them to be pretextual. But the instructions given prohibited the jury from considering the motives of the city council members. The only issue the jurors were allowed to consider was whether the regulation advanced the City's legitimate interests. At bottom, this is an inquiry into the validity of a predictive judgment and not a question of fact.

260 U.S. at 413. And the Court later explained:

"If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts."

*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 393 (1926) (quoting *State v. City of New Orleans*, 97 So. 440, 444 (La. 1923)).

Because "debatable questions as to reasonableness are not for the court but for the Legislature," *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595 (1962) (quoting *Sproles v. Binford*, 286 U.S. 374, 388 (1932)), juries obviously have no role to play in assessing the "reasonableness" of legislative means. As the Court has explained:

[W]here the legislative judgment is drawn in question, [the inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. . . . [N]either the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.

*United States v. Carolene Products*, 304 U.S. at 154; see also *Atlantic & Pacific Telegraph Co. v. City of Philadelphia*, 190 U.S. 160, 166 (1903) (quoting 1 Dillon, *Municipal Corporations* § 327 (4th ed.) ("Whether an ordinance be reasonable and consistent with the law or not is a question for the court, and

not the jury, and evidence to the latter on this subject is inadmissible.' ")).

2. Notwithstanding the similarity between this inquiry and the substantive due process standard of review, the court of appeals rejected as unhelpful the City's argument that in determining whether there is a right to a jury trial on this issue, it "analogize this inquiry to that undertaken by courts addressing substantive due process claims." Pet. App. 12a. Instead, the court declared that "referring to eminent domain and inverse condemnation cases appears to us to be a safer course." *Id.* at 13a. The court largely failed to follow this course, however, citing only one case, *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which it read as "indicat[ing] that the inquiry is essentially factual" and thus for a jury to decide. Pet. App. 15a.

This is an odd conclusion to draw from *Dolan* given that there was no jury trial at any point in the various administrative and judicial proceedings in which the case was litigated. See 512 U.S. at 379-83. Indeed, it is noteworthy that the factual findings which the *Dolan* Court found insufficient to support the City's dedication requirement were made by the City's planning commission, an administrative agency with substantial expertise, and not by a common law jury. As a general matter, when courts review orders of an administrative agency they are required to give the agency's factual findings broad deference. II Davis & Pierce, *Administrative Law Treatise* § 11.2, at 174. Notably, *Dolan* says nothing that even remotely suggests that the issue of whether a land use regulation substantially advances a legitimate government interest is within the competence of a common law jury. Courts are quite capable of resolving the constitutionality of agency orders and regulations on the basis

of an administrative record. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837-42 (1987) (holding unconstitutional, on basis of agency record, permit condition imposed by land use planning agency because it was irrational). Indeed, as *Nollan* demonstrates, whether a permit condition substantially advances a legitimate government interest is a question of law that the court decides.

This Court's cases interpreting the Takings Clause's "public use" requirement reinforce the conclusion that juries have no role in assessing the validity of a land use regulation. As this Court has made clear, the federal courts' role "in reviewing a legislature's judgment of what constitutes a public use . . . is 'an extremely narrow' one." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)). The Court accordingly "will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Id.* at 241 (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)).

Thus, "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.* (citations omitted). This is so even though a regulation "may not be successful in achieving its intended goals." *Id.* at 242. As the Court has further explained

"whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective." When



the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.

*Id.* at 242-43 (quoting *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72 (1981)) (other citations omitted).

The Court's circumscription of the scope of judicial inquiry in eminent domain proceedings highlights the inappropriateness of submitting to a jury the analogous question of whether a land use regulation substantially advances a legitimate government interest. If courts are not to engage in "empirical debates over the wisdom of takings," *id.*, juries cannot be empowered to engage in empirical debates over the efficacy of land use regulations. Rather, the limited judicial inquiry which the takings clause contemplates with respect to the rationality of government action, whether it be for purposes of formal condemnation proceedings or for land use regulation, is a question of law which the court must decide. The court of appeals erred in failing to recognize as much.

# CONCLUSION

The judgment of the court of appeals should be reversed.

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June 4, 1998

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CLERK

No. 97-1235

In the

**Supreme Court of the United States**

**October Term, 1997**

**CITY OF MONTEREY,**

*Petitioner,*

v.

**DEL MONTE DUNES AT MONTEREY LTD.,  
AND MONTEREY-DEL MONTE DUNES CORP.,**

*Respondents.*

**On Writ of Certiorari  
To the United States Court of Appeals  
For the 9th Circuit**

**BRIEF OF THE STATES OF NEW JERSEY, ALASKA,  
ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE,  
FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA,  
IOWA, MAINE, MARYLAND, MICHIGAN,  
MINNESOTA, MONTANA, NEW HAMPSHIRE, NEW  
MEXICO, NEW YORK, NORTH CAROLINA, NORTH  
DAKOTA, OREGON, RHODE ISLAND, TENNESSEE,  
VERMONT, VIRGINIA, WASHINGTON,  
WESTVIRGINIA AND THE TERRITORY OF GUAM  
AS AMICI CURIAE  
IN SUPPORT OF PETITIONER**

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## INTEREST OF THE AMICI CURIAE

Recognizing this Court's consistent admonition that the Fifth Amendment's takings clause "[is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 123 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)), the *amici* states have established policies and procedures to balance fairly the rights of individual property owners and the interests of the public. This case raises both procedural and substantive issues that threaten the delicate balance the 30 *amici* states and territories have labored to maintain.

Specifically, this case first raises the issue of whether a right to jury trial exists under 42 U.S.C. § 1983 or the Seventh Amendment on liability issues in federal takings cases. If such a right is determined to exist, the ruling will substantially impact *amici* states that have established state court procedures to provide just compensation consistent with this Court's decision in *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). Those state court procedures do not generally provide a right to jury trial on liability issues, although many states have juries decide the amount of compensation due if a taking has occurred. Establishing such a right in federal court may defeat the preclusive effect of the state court adjudication. This would lead to substantial additional litigation of takings claims in federal court and would permit federal juries to reevaluate the decisions of state courts, legislatures and administrative agencies on matters within their expertise and authority.

This case also raises the question of the appropriate standard for reviewing state legislative enactments and administrative decisions that do not involve a physical intrusion or exaction in order to determine whether such actions amount to a taking. Although states have traditionally been afforded deference in

exercising their police powers to further the public interest, the decision below alters the traditional rule and inserts federal juries into the role of second-guessing state legislatures and administrative agencies. While a heightened standard may be appropriate where government exacts a condition comparable to a physical taking in exchange for government approval, the expertise and judgment of state officials attempting to rationally balance development and environmental protection should be respected.

For example, over one million acres of land in the State of New Jersey -- almost one quarter of the state -- have been designated as protected pinelands. The Pinelands National Preserve, originally established pursuant to federal law, 16 U.S.C. § 471i, overlies the vast Cohansey aquifer, an important source of drinking water not only for New Jersey, but for neighboring states as well. See generally *Gardner v. New Jersey Pinelands Comm'r*, 593 A.2d 251 (N.J. 1991). New Jersey also contains hundreds of miles of sensitive coastal property and freshwater wetlands. At the same time, New Jersey is the most densely populated state in the union. The State's unique concerns have led to a complex scheme of regulation designed to protect these sensitive habitats but permit sensible and appropriate development. If a particular property owner claims to be unfairly burdened by a legislative enactment or administrative determination, remedies exist to review the legality of these acts, to determine if they constitute a "taking," and, if so, the appropriate amount of compensation. Other *amici* states have comparable restrictions and remedies that have been carefully fashioned by elected officials and local experts. Their considered judgment and authority to act in the interest of their citizens should not be subject to second-guessing by a federal jury.

## SUMMARY OF ARGUMENT

1. Neither 42 U.S.C. § 1983 nor the Seventh Amendment guarantees a jury trial on liability in regulatory takings cases in federal court. The language of the statute does not support an interpretation that Congress intended to create a right to jury trial for all cases brought under § 1983. Nor does the Seventh Amendment confer such a right. The Seventh Amendment was intended to preserve the right to jury trial in cases where such a right existed at common law. While the concept of "regulatory takings" did not exist at common law, it derives from cases brought pursuant to government's power of eminent domain. As it is well-established that no right to jury trial on liability issues exists in eminent domain proceedings, *United States v. Reynolds*, 397 U.S. 14 (1970), no such right exists for inverse condemnation or regulatory takings cases.

Moreover, a decision finding a right to jury trial on liability in such cases would unfairly and unnecessarily complicate the litigation of takings disputes. Finding a right to jury trial on liability would undermine this Court's decision in *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). In *Williamson*, this Court ruled that a federal takings claim is not ripe until a plaintiff has fully litigated on the state level (1) how the regulation affects the property in question to determine whether a taking has occurred; and (2) the amount of compensation due if the regulation or decision is deemed to constitute a taking. Only then can a federal plaintiff know whether the property has been taken and whether just compensation has been denied, thus giving rise to a federal cause of action. Generally, the federal courts give preclusive effect to issues fully and fairly litigated in the state court proceedings. If there is a right to a jury trial in federal takings cases, but none provided in the state proceedings, such preclusive effect may not be afforded. Thus, the state may be forced to relitigate the very issues litigated fully in state court. Such duplicative litigation would undermine the decision in *Williamson*, as there is no logical purpose to require ripening



of a claim in state court, or for the state to provide a mechanism for doing so, only to relitigate completely in federal court. Moreover, relitigation would essentially transform the federal court into an appeals court for state cases, thus compromising state sovereignty in an area of crucial state interest.

2. Absent a threshold finding that the government's action is arbitrary and unreasonable or for a purely private purpose, the court's view of the wisdom of the legislative or executive action is not relevant to whether there is a "taking" of property. The "taking" analysis should focus on the degree to which the government action interferes with the use of the property or the essential strands in the "bundle of rights" associated with property ownership.

This rule is consistent with historical jurisprudence in taking cases. This Court has, since *Agins v. City of Tiburon*, 447 U.S. 255 (1980), stated that there are two separate analyses to conduct in determining whether government action constitutes a taking -- whether the government action substantially advances a legitimate state interest, and the degree to which it eliminates economically viable use of the land. However, the takings analysis that has been applied by this Court since *Agins* has focused almost exclusively on the second part of the test. State *amici* assert that this focus is appropriate, as the government's purpose is relevant to the constitutionality of its action, but does not determine whether that action constitutes a "taking." Thus, while a threshold question must be posed to ensure that the government's action is not arbitrary, unreasonable or for a purely private purpose, the takings analysis has and should focus on whether the effect of the government's action is such that the cost should be borne by society as a whole. Except where government utilizes its power to exact a physical taking as a condition of regulatory approval, the Court's review of the wisdom of the legislative or executive determination has been deferential. That deference should be maintained as it fairly balances the interests of the government and the individual property owner and respects the

expertise of administrative agencies and the authority of state legislatures.

3. Thus, the "rough proportionality" standard established for exaction cases in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), should not be extended to regulatory takings cases. To date, this Court has only applied rough proportionality where there is an exaction of property. This approach evolved because exaction is viewed as a way around eminent domain, and its effect on the bundle of property rights compares to that of a physical taking. The same is not true of regulatory takings unless they "go too far" and destroy all economically viable uses of the land. Because an exaction is a "condition substituted for the prohibition," and implicates the doctrine of "unconstitutional conditions," the Court has required a greater showing of a nexus between the condition and the approval sought. Absent such an effort by the government to exact such a condition, a nexus and "rough proportionality" should not be required.

## ARGUMENT

### I. THERE IS NO RIGHT TO A JURY TRIAL ON LIABILITY IN REGULATORY TAKINGS CASES IN FEDERAL COURT

The court below found that 42 U.S.C. § 1983 guarantees a right to jury trial on both liability and damages issues in inverse condemnation proceedings. This ruling is inconsistent with the plain language of the statute as well as this Court's extensive jurisprudence on the Seventh Amendment's application to newly created statutory and legal rights. Finding a right to jury trial for liability issues would contravene existing Seventh Amendment law and effectively undermine existing Supreme Court precedent regarding the proper litigation of regulatory takings cases.

#### A. Neither 42 U.S.C. § 1983 Nor the Seventh Amendment Guarantees the Right to a Jury

As acknowledged by the Ninth Circuit in the decision below, 42 U.S.C. § 1983 is silent as to whether there is a right to jury trial for claims brought pursuant thereto. (Pet. App. 7). Although elsewhere Congress clearly expressed its intent to provide a right to jury trial in civil rights cases, 42 U.S.C. § 1981a, it did not do so in § 1983. This creates a powerful negative inference that § 1983 was not intended to create a right to jury trial. See *Lindh v. Murphy*, 117 S. Ct. 2059, 2075-76 (1997) (inferring negative implication from disparate provisions within single statute).

Finding no assistance in the plain language of § 1983, the Court below proceeded to search for other signs of Congressional intent. With little or no analysis, the Court concluded that it was "logical" to assume that Congress intended to provide a right to jury trial in actions "at law" brought pursuant to the statute, but not those brought "in equity." (Pet. App. 7-8). To determine whether an action for

inverse condemnation was an action "at law" for which a jury trial must be granted, the Court looked to Seventh Amendment jurisprudence. The Court concluded that inverse condemnation was an action "at law," based primarily on the fact that compensatory damages were sought. (Pet. App. 9).

In reaching its conclusion that 42 U.S.C. § 1983 was intended to create a right to jury trial in inverse condemnation cases, the Ninth Circuit rejected the arguments of the City of Monterey and the State of California that inverse condemnation proceedings are comparable to eminent domain proceedings for which no right to jury trial on liability is afforded. The court reasoned:

Eminent domain proceedings, however, are actions at law. Such proceedings are not tried before a jury because the United States traditionally is a party. Thus, merely because inverse condemnation actions are similar to eminent domain actions, does not necessarily lead to the result that they are not "actions at law" triable by a jury. (Pet. App. 8-9 (citations omitted)).

This reasoning is plainly erroneous. First, it is incorrect that there is no right to jury trial in eminent domain proceedings because "the United States traditionally is a party." This Court's decisions for over 100 years have repeatedly affirmed that there is no right to jury trial on liability in eminent domain proceedings in cases involving condemnation at all levels of government. See, e.g., *Dohany v. Rogers*, 281 U.S. 362 (1930) (state highway commission); *Backus v. Fort St. Union Depot Co.*, 169 U.S. 557 (1898) (state-created corporation); *Long Island Water Supply Co. v. City of Brooklyn*, 166 U.S. 685 (1897) (city); *Bauman v. Ross*, 167 U.S. 548 (1897) (District of Columbia).

Second, the Ninth Circuit decision erroneously applies Seventh Amendment jurisprudence. This Court has consistently held that the Seventh Amendment was intended to preserve the



right to jury trial in cases for which such a right existed at common law in 1791. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). Where the claim at issue was not found at common law in 1791, a court should determine whether the claim is more similar to those tried in courts of law or those tried in courts of equity in the 18th Century. *Tull v. United States*, 481 U.S. 412 (1987). This analysis requires an examination of the nature of the action and of the remedy sought. *Id.*

Here, the court below correctly recognized that neither § 1983 nor inverse condemnation were actions cognizable in 1791. The court then dismissed the similarity to condemnation, from which inverse condemnation derives, in favor of an analogy to trespass. (Pet. App. 8-9). Clearly, however, a comparison to eminent domain is most appropriate in determining whether a jury trial on liability is required under either § 1983 or the Seventh Amendment. Causes of action for regulatory takings are derived from the Fifth Amendment prohibition, made applicable to the states through the Fourteenth Amendment, against the condemnation of property without compensation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992), this Court recognized that the rule that property has been "taken" when a regulation deprives the owner of all beneficial use of the property derives from the principle "that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." With respect to proofs and issues, state inverse condemnation cases are generally the same as traditional eminent domain proceedings. See *Schiavone Constr. Co. v. Hackensack Meadowlands Dev. Comm'n*, 486 A.2d 330, 333-4 (N.J. 1985) (holding that the provisions of the Eminent Domain Act govern inverse condemnation cases). Indeed, in some states these actions are styled as mandamus proceedings aimed at requiring states to institute eminent domain proceedings. See, e.g., *Schaller v. State of Iowa*, 537 N.W.2d 738 (Iowa 1995). As it is clear that liability issues in eminent domain

proceedings are issues for which a jury trial is traditionally not required, no such right on liability issues in inverse condemnation cases should be created.

**B. Creating a Right to Jury Trial in Federal Takings Cases Would Undermine the Decision in *Williamson* and Interfere with State Sovereignty**

The creation of a right to jury trial in federal takings cases is not only inconsistent with the plain language of § 1983 and the Seventh Amendment, it would (1) undermine this Court's decision in *Williamson*, *supra*, 473 U.S. 172, and (2) violate principles of federalism by interfering with a state's administration of takings litigation in its own courts and by permitting federal juries to review state court judgments. For these reasons as well, the Court should decline to create a right to jury trial on liability in federal takings cases.

Finding a right to jury trial on liability in takings cases would threaten the sound administration of justice by undermining prior Supreme Court precedent regarding the proper litigation of such cases. In *Williamson*, this Court recognized that a federal takings claim is not ripe "until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." In addition, the Court held that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195.

Many of the *amici* states have developed procedural remedies for property owners to challenge the government action, litigate whether such action constitutes a taking of the property at issue, and determine, if a taking has occurred, the amount of compensation that is just. For example, in New Jersey, a plaintiff may challenge a permit denial or regulation

by appealing final agency action to the Appellate Division of the Superior Court. See *N.J. Court Rule 2:2-3*. If the administrative decision is upheld, or the plaintiff does not challenge its validity, and the plaintiff believes that his or her property has been "taken," an action for inverse condemnation or in lieu of prerogative writ may be brought in the trial division of the Superior Court. See *Gardner v. New Jersey Pinelands Comm'n*, 593 A.2d 251 (N.J. 1991); *Schiavone, supra*, 486 A.2d at 333-4; see also *Boise Cascade Corp. v. Board of Forestry*, 935 P.2d 422 (Ore. 1997) (setting forth Oregon's inverse condemnation procedure).

In such proceedings, issues of liability are determined by the court. N.J.S.A. 20:3-5. If the court finds that a taking has occurred, a panel of commissioners and ultimately a jury, if demanded, determine the amount of just compensation. *Van Dissel v. Jersey Central Power & Light Co.*, 438 A.2d 563 (N.J. 1981), *certif. den.*, 446 A.2d 141 (1982), *cert. granted and vacated on other grounds*, 465 U.S. 1001(1984); N.J.S.A. 20:3-12, -13; see also *Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc.*, 521 So. 2d 101, 104 (Fla. 1988), *cert. denied*, 488 U.S. 870 (1988) ("the trial judge in an inverse condemnation suit is the trier of all issues, legal and factual, except for the question of what amount constitutes just compensation"). In other states, a writ of mandamus may be sought by the property owner to force the government agency to institute a condemnation action. See, e.g., *Schaller v. State of Iowa*, 537 N.W.2d 738 (Iowa 1995). In the mandamus action a judge determines whether a taking has occurred. If that question is answered in the affirmative, a compensation commission and jury ultimately fix the amount of just compensation. *Id.*; Iowa Code §§ 6B.4, 6B.21 (1992). Some other states permit either process, but in each process a judge will determine liability with a right to jury trial only if a taking has been found. See, e.g., *Hensler v. City of Glendale*, 876 P.2d 1043 (Cal. 1994), *cert. denied*, 513 U.S. 1184 (1995). Other states vest both liability and compensation determinations in the discretion of state court trial judges. See

*Spears v. Berle*, 397 N.E.2d 1304, 1306 (N.Y. 1979); N.Y. Court of Claims Act §§ 8, 9.

If a property owner claims at the end of the state process that just compensation has been denied, the federal forum is then available for the litigation of the Fifth Amendment claim.<sup>1</sup> *Williamson*, 473 U.S. at 194-97. As a general matter, collateral estoppel is raised as a defense to preclude relitigation of the issues decided in state court. Disposition of this defense in the federal courts has varied depending on the particular circumstances of each case, although the courts have generally heeded this Court's requirement that full faith and credit be given state court decisions resulting from full and fair litigation of constitutional claims. See *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 473-4 (1982); *Allen v. McCurry*, 449 U.S. 90, 103-104 (1980). As a result, preclusive effect is often applied to state inverse condemnation decisions. See, e.g., *Palomar Mobilehome Park v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993); *Peduto v. City of North Wildwood*, 878 F.2d 725 (3d Cir. 1989).<sup>2</sup>

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<sup>1</sup> In this case, the Ninth Circuit determined in an earlier ruling that respondents' Fifth Amendment claim was ripe. *Del Monte Dunes at Monterey v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990). The court based its decision on a "limited futility exception" to the requirement that the landowner obtain a final decision from the administrative agency. *Id.* at 1501. The Court also found that the compensation element of respondents' claim was ripe because at the time the City rejected respondents' last development application, California had no mechanism for seeking compensation for a regulatory taking through an inverse condemnation action. *Id.* at 1507.

<sup>2</sup> Exceptions include cases where (1) a plaintiff has specifically reserved federal rights pursuant to *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), see, e.g., *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995); *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992), or (2) the state court remedy is deemed to be insufficient, see, e.g., *New Port Largo, Inc. v. Monroe*



The states would not, of course, be required to alter their procedures and provide a right to jury trial in state court on liability if the Court upholds the Ninth Circuit decision in this case. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916). However, a failure to do so would create uncertainty as to the preclusive effect of the state court judgment and potentially expose the state to full relitigation of the issues litigated in the state court proceeding. In *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979), this Court held that granting preclusive effect to an equitable determination did not automatically violate the petitioner's Seventh Amendment right to jury trial even though the issue petitioners sought to relitigate was one to which they were entitled to a jury in federal court. However, in *Lytle v. Household Mfg.*, 494 U.S. 545 (1990), the Court declined to extend the holding in *Parklane*, and denied preclusive effect to equitable rulings that were rendered prior to the disposition of legal claims solely because of the erroneous dismissal of the legal claims on motions for summary judgment.

The Court in *Lytle* reiterated the holding of *Beacon Theaters v. Westover*, 359 U.S. 500, 510-511 (1959), that "only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims." 494 U.S. at 550. See also *Parklane Hosiery*, 439 U.S. at 347 (Rehnquist, J., dissenting) ("developments in the judge-made doctrine of collateral estoppel, however salutary, cannot, consistent with the Seventh Amendment, contract in any material fashion the right to a jury trial that a defendant would have enjoyed in 1791"). Thus, liability issues decided by state court judges in condemnation

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*County*, 95 F.3d 1084, 1089 (11th Cir.1997), cert. denied, 117 S. Ct. 2514 (1997). See also *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1676 n.8 (1997) (noting that to satisfy *Williamson*, a plaintiff must seek compensation first through state inverse condemnation proceedings unless the state "does not provide adequate remedies for obtaining compensation").

proceedings would be of uncertain preclusive effect in subsequent federal takings cases if a right to jury trial is found to exist on liability for takings in federal court.

For many valid policy reasons, states may choose to continue to entrust liability issues in takings cases to a judge. As this Court has recognized, whether a particular question is one for the jury or the court may be based on a conclusion that "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller v. Fenton*, 474 U.S. 104, 114 (1985). As liability for takings presents complex legal issues, a state may appropriately determine that these issues should be addressed by a court. Submitting liability issues to the court promotes uniformity in regulatory takings cases, which many states view as essential so that local governments do not operate in a zone of uncertainty when regulating land use. See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 390-91 (1996).

Yet if a state fails to provide a jury trial on liability, it will be faced with the possibility of having to relitigate identical issues in federal court. In essence, states may be punished for making valid policy choices regarding the state mechanism to address just compensation. Indeed, states may be punished for providing a remedy at all, as the absence of a remedy will assure litigation of these issues only once, even if in federal court. States attempting to manage this burgeoning field of litigation should not be forced to choose between the orderly adjudication of takings cases and the preclusive effect of the state adjudications.

Finding a right to jury trial on liability in federal takings cases would not only intrude upon a state's administration of its judicial system, it would improperly transform the lower federal courts into appeals courts for state cases. See *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). A federal jury would be permitted to reevaluate the decisions of state courts and

administrative agencies in areas of crucial state interest. A federal plaintiff would get a "second bite of the apple" in the already crowded federal courts, and in a context where attorneys fees may be available if the jury reaches a different conclusion than the state court. See 42 U.S.C. § 1988; see also N.J.S.A. 20:3-26(c) (providing for award of fees and expenses to plaintiffs in inverse condemnation proceedings). In *Williamson* and elsewhere, this Court has recognized that state courts should initially determine how to balance private property interests and public needs. This recognition, which is fully consistent with comity and principles of state sovereignty, should not be undermined by recognizing a right to jury trial that is neither supported by the statute at issue nor by the Seventh Amendment.

## II. THE TAKINGS CLAUSE SHOULD NOT BE INTERPRETED TO OVERRIDE THE USUAL DEFERENCE GIVEN TO STATE AND LOCAL LEGISLATURES AND AGENCIES

To establish that a government regulation or administrative action constitutes a taking of property, this Court has stated that the property owner must demonstrate that (1) the government's action fails to substantially advance legitimate state interests, or (2) that it deprives the property owner of all economically viable use of the land. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). With respect to the first prong of the *Agins* test, this Court has acknowledged that its cases "have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987). This case provides an opportunity to clarify the proper standard for reviewing whether a government action substantially

advances a legitimate state interest and for placing that review in the proper context.<sup>3</sup>

The state *amici* submit that unless a threshold finding is made that the government's action is arbitrary and unreasonable or for a purely private purpose, the court's (or a jury's) view of the wisdom of the legislative or executive action is not relevant to whether there is a "taking" of property. While a review of the government's action is appropriate to ensure that property is not being taken for a private purpose or in an otherwise unconstitutional manner, the "taking" analysis itself should focus on the degree to which the government action interferes with the use of the property or the essential strands in the "bundle of rights" associated with property ownership. Such an analysis is consistent with the prior pronouncements of this Court and will provide appropriate deference to legislative and executive determinations in areas of state interest.

Although this Court has not specifically elaborated on this issue, a review of the historical treatment of the government purpose prong demonstrates that the standard we propose is consistent with this Court's prior rulings. In each case, the focus has been on the effect of the government action on the "bundle of rights" associated with property ownership. Except in cases where the government has utilized its power to exact a physical taking from the property owner in exchange for approval, see Point III, below, this Court has afforded deference to legislative and executive judgments. The Ninth Circuit's departure from this course has allowed a federal jury to substitute its judgment regarding the protection of the

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<sup>3</sup> The jury below did not specify whether it found that a taking had occurred (1) because the government's action "failed to substantially advance a legitimate state interest," or (2) because there was no economically viable use of respondents' land. The Ninth Circuit, therefore, reviewed whether the jury's verdict was sustainable on both theories. The questions for which *certiorari* was granted relate to the first possible basis for the jury's decision. (Pet. App. 6).



environment not only for the Monterey City Council, but for the California Department of Fish and Game and the United States Fish and Wildlife Service.

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), this Court first recognized that a regulation may go so far as to constitute a taking. In that case, the plaintiffs purchased only the surface rights to the property on which they built their home. The defendant coal company had sold them the property and, in doing so, specifically reserved all rights to mine the coal beneath the surface. When the defendant gave notice that it was to begin mining coal beneath plaintiffs' home, they sought to enjoin such mining, arguing that defendant's right was extinguished by a statute that banned mining where resulting subsidence would threaten residential property owned by another. The Court found that the statute cited by the plaintiffs could not be sustained as a constitutional exercise of police power, as it served only the private purpose of altering the bargain between the parties to the benefit of plaintiffs, and because of its extreme effect on the value of the defendant's property rights. In oft-quoted language, Justice Holmes wrote for the Court:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

[*Id.* at 413].

This paragraph should form the blueprint of any rule announced in this case regarding the proper level of scrutiny of the government's interest. If the government's action is for a valid public purpose and is reasonably exercised within its constitutional powers, the inquiry must shift to determine whether the effect on the property owner's rights is of such a magnitude that it is unfair to require the property owner alone to pay the costs of the government's exercise of its police power.

Focusing on the effect on essential property rights is fully consistent with this Court's precedents. In *Penn Central Transportation Co., v. New York City*, 438 U.S. 104 (1978), the Court cited several factors significant to the inquiry of whether a taking has occurred. The Court cited the economic impact of the regulation and the degree to which it interferes with investment-backed expectations. *Id.* at 124. The Court also cited the "character of the governmental action" as a factor, stating that a taking may more readily be found when the interference is comparable to a physical invasion than "when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* The Court then reviewed a series of cases where government action reasonably characterized as in the public interest was found not to constitute a taking even though it had an adverse effect on "recognized economic values," *id.* at 124-27, and contrasted cases where such actions were found to constitute takings because of the magnitude of their effect on the use of the property or their characterization as "acquisitions of resources." *Id.* at 127-28. The analysis in *Penn Central* suggests that the key to determining if a regulation constitutes a taking is not a jury or court's view of the wisdom of the government's choices in "adjusting the benefits and burdens of economic life to promote the common good," but the degree to which the government's action is akin to a physical taking and the magnitude of its effect on the property owner's rights.

In *Agins v. City of Tiburon*, *supra*, 447 U.S. 255 (1980), the Court first used the term "substantially advance legitimate state interests" in dicta to describe one of the tests to determine if a regulation constitutes a taking. In support of this proposition, the Court cited *Nectow v. Cambridge*, 277 U.S. 183 (1928), which was a Fourteenth Amendment due process challenge to a residential zoning ordinance. In *Nectow*, the Court found that a restriction on the use of property violates due process if it "does not bear a substantial relation to the public health, safety, morals, or general welfare." 277 U.S. at 188. *Nectow*, in turn, was based on *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), also cited by the Court in *Agins*, 447 U.S. at 261, in which a residential zoning ordinance was upheld against a claim that the ordinance deprived the appellees of property without due process. In the portion of the decision cited in *Nectow* and *Agins*, the *Euclid* Court found that the reasons advanced for the ordinance "are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." 272 U.S. at 395. This conclusion suggests that the state-interest review set forth in *Agins* is based on a due process standard, and therefore that it should be as deferential to the government as the review applied in due process cases. See *Hodel v. Indiana*, 452 U.S. 314 (1981).<sup>4</sup>

This is not to say that the takings inquiry is identical to that applied in due process cases. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-35 n.3. In *Agins*, as in *Mahon* and *Penn Central*, an additional factor is added to the inquiry: the magnitude of the regulation's impact on essential aspects of a

<sup>4</sup> In this case, the trial judge reviewed and rejected the plaintiff's substantive due process claim, finding that the city acted for valid regulatory reasons based on the conclusion of federal and state regulatory agencies that the environmental concerns posed by the project were not adequately resolved. (Pet. App. 41-42).

property owner's bundle of rights. Thus, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the validity of the government's interest in assuring public access to navigable waters was not questioned, but the government's action was found to go "so far beyond ordinary regulation or improvement for navigation as to amount to a taking." *Id.* at 178. The Court reached this conclusion because the government's action interfered with the petitioner's right to exclude others, which the Court viewed as a "fundamental element" of property rights, and because the government's action was found to be akin to an "actual physical invasion of the privately owned marina." *Id.* at 180. Accord *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (the legitimacy of the public interest behind the challenged statute and the means by which the legislature chose to address that interest were not challenged, but the statute was found to effect a taking because it eliminated all economically viable use of the property).

That the true focus of the takings inquiry has been the effect on property rights is further supported by the decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). In *Keystone*, another Pennsylvania statute aimed at protecting the public from coal mine subsidence was reviewed. This time, the Court found the statute to be a valid exercise of the police power. The Court reached to distinguish the statute struck down in *Mahon* with respect to the public benefit, finding a distinction in the slightly broader scope of the Act and the fact that "circumstances may so change in time . . . as to clothe with such a [public] interest what at other times . . . would be a matter of purely private concern." *Id.* at 488 (quoting *Block v. Hirsh*, 256 U.S. 135, 155 (1921)). However, the Court found no difficulty in concluding that the petitioners "failed to make a showing of diminution of value sufficient to satisfy the test set forth in *Pennsylvania Coal* and our other regulatory takings cases." *Id.* at 492-93. Perhaps the key to the distinction between *Mahon* and *Keystone* was not merely the



passage of time, but the Court's view of the magnitude of the effect on the property owner's bundle of rights.<sup>5</sup>

Several other takings cases provide ample evidence that the focus has been on the degree to which the magnitude of the invasion makes it akin to a physical invasion or totally deprives a property owner of an aspect of property ownership deemed fundamental. In *United States v. Causby*, 328 U.S. 256 (1946), the frequent passage of low-flying aircraft was deemed to constitute a taking. Although the Court did not question that "[t]he airplane is a part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment," *id.* at 266, the intrusion was deemed a taking because the flights were so low and so frequent that they directly impaired the property's owner's ability to inhabit the property. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (explaining that the decision in *Causby* was based on the intrusion's similarity to a physical taking). In *Kirby Forest Industries v. United States*, 467 U.S. 1, 15 (1984), the Court found that no taking had occurred during a period prior to condemnation by the United States, because the property owner's ability during that period to use or sell the property was not abridged.

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<sup>5</sup> This proposition is supported by the dissent in *Keystone*, authored by Chief Justice Rehnquist and joined by Justices Powell, O'Connor, and Scalia, which strongly questioned the majority's distinction from *Mahon* with respect to the public interest served. *Keystone*, 480 U.S. at 510-511. Ultimately, however, the dissent was based on the view of those Justices that the majority erred in finding that the Act did not extinguish an essential aspect of the petitioner's property right. *Id.* at 520-521. Indeed, the dissent specifically points out that "[t]he similarity of the public purpose of the present Act to that in *Pennsylvania Coal* does not resolve the question whether a taking has occurred; the existence of such a public purpose is merely a *necessary prerequisite* to the government's exercise of its taking power." *Id.* at 511 (emphasis added).

In *Loretto*, which involved an actual physical invasion, the Court described the fundamental "bundle of rights" that could not be eliminated without just compensation. The Court noted that property rights generally include the right to "possess, use and dispose" of property. 458 U.S. at 435 (quoting *United States v. General Motors Corp.*, 323 U.S. 373 (1945)). This bundle includes the right to exclude others and the power to control the use of the property. *Id.* at 435-36. This analysis was reiterated in *Lucas*, where the Court held that the deprivation of all economically viable use of the property was a fundamental interference that constituted a "taking," and in *Nollan*, where the Court stressed that the right to exclude others was an essential "stick in the bundle of rights" associated with property ownership. 483 U.S. at 831.

In short, although the Court has maintained that an analysis of the purpose and reasonableness of the government's action must be conducted in takings cases, its determination of whether a taking has occurred has consistently turned on the degree to which the government action destroys all or some of the fundamental "sticks" in the bundle of property rights. While a review of the public purpose and government interest is no doubt important, it is not properly viewed as a prong of the takings inquiry but rather as a threshold question which ensures that the government action is for a "public purpose" and that it is not so unreasonable that it exceeds "constitutional powers."

This approach will ensure that takings cases will be resolved with the appropriate deference to state legislative judgments and administrative expertise that is required by principles of federalism and separation of powers. See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240-41 (1984) (holding that the "public use" requirement is coterminous with the sovereign's police power, and that the Court "will not substitute its judgment for a legislature's judgment as to what constitutes a public use" unless palpably unreasonable). This Court has long recognized that the regulation of land use is an area

"peculiarly within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508, n. 18 (1975); see also *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994) ("Regulation of land use [is] a function traditionally performed by local governments"). This Court has also recognized that administrative agencies and legislatures should be afforded deference on matters within their expertise and authority. See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *FPC v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972); *Hawaii Housing Authority*, 467 U.S. at 240-41. Yet in this case, the Ninth Circuit held that the jury was entitled to credit the property owner's experts and discredit the conclusions of the responsible city, state and federal agencies regarding the effectiveness of the developer's mitigation plan in protecting the habitat of an endangered species. (Pet App. 18, 42). This standard for reviewing government action would permit federal juries to substitute their judgment for that of state legislators and executive officials, whereas the standard proposed by the state *amici* will afford appropriate deference to these officials while ensuring a fair inquiry into whether their actions require compensation to affected property owners.

The public interest analysis is not a "license to judge the effectiveness of legislation," *Keystone*, 480 U.S. at 487 n.16, and 511 n.3, or a means to allow a federal jury to intrude upon state executive and legislative determinations regarding the public interest. The issue is not whether a jury or court views the government action as the best choice, but whether the action is consistent with the Fifth Amendment's purpose of prohibiting government from asking an individual owner to bear a cost that in all fairness should be borne by the public as a whole. Because the Ninth Circuit permitted the jury in this case to reevaluate the wisdom of the government's action, its decision fails to afford appropriate deference to the government's determination of the public interest and should be reversed.

### III. THE ROUGH PROPORTIONALITY STANDARD SHOULD NOT BE EXTENDED TO REGULATORY TAKINGS CASES IN WHICH NO EXACTION IS DEMANDED

The Ninth Circuit erred in extending the "rough proportionality" standard that this Court has applied in exaction cases to cases alleging a regulatory taking. This Court has only applied this heightened standard of review in cases where the government has used its power in an effort to exact a dedication of property from the owner in exchange for a regulatory approval. A heightened standard has been applied in such cases because, due to an exaction's similarity to a physical taking, the Court has viewed exaction as a means of avoiding the exercise of eminent domain, and because it implicates the doctrine of "unconstitutional conditions." The extension of this standard to regulatory takings is thus inconsistent with the purpose of the standard and fails to provide appropriate deference to the legislative and executive decisions of local governments.

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the property owners sought to demolish a bungalow on beachfront property and rebuild a home on the lot. The Coastal Commission granted the Nollans a permit to do so, but on the condition that they permit the public an easement to pass across a portion of the property to the beach. The Court ruled that this condition constituted a taking. It reasoned that had the Commission ordered the Nollans to provide the easement, rather than conditioning approval on their cooperation, the easement would have constituted a "permanent physical occupation" comparable to that in *Loretto*. Because as a result of the easement, "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed," the fundamental right to exclude is destroyed, thus constituting a taking. *Nollan*, 483 U.S. at 832.

The Court then analyzed whether imposing the easement as a condition altered the outcome of the analysis. The Court



found that it did not because the public interests served by the easement were unrelated to any harm that might be caused by granting the Nollans' application. The Court reached this conclusion by finding that no nexus existed between the condition and the public interests asserted to support the government's action, concluding that the condition thus failed to substantially advance a legitimate state interest. *Id.* at 837.

The analysis used by the Court demonstrates why this level of review is appropriate where such a condition is exacted from the property owner, but not in the context of a regulatory taking. The Commission argued that the purpose of the condition included protecting the public's ability to see the beach, encouraging them to use the beach despite development along the shore, and preventing congestion at public beaches. The Court assumed, without deciding, that these were legitimate public goals. As a result:

The commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede these purposes, unless denial would interfere so drastically with the Nollans' use of their property as to constitute a taking. [*Id.* at 835-36].

Thus, had the government purposes been achieved through a regulation or administrative decision prohibiting the Nollans from pursuing their plan, the takings analysis would not have focused on the government's purpose, but on the degree to which its action interfered with the Nollans' use of their property. The addition of an exaction, however, caused the Nollan Court to delve into the government's purpose and whether the exaction was connected to achieving that purpose. The Court noted that a condition such as a height or fence restriction "that would have protected the public's ability to see the beach," *id.* at 836, would be constitutional, but that when the condition is unrelated to the government's goals, "the building

restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* at 837 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)).

The opinion in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), also supports the proposition that the nexus requirement was specifically intended to apply only to exactions of fundamental property rights. The *Dolan* Court described the ruling in *Nollan* as follows:

In *Nollan*, *supra*, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right -- here the right to receive just compensation when property is taken for a public use -- in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property. [*Id.* at 385].

Thus, the nexus requirement is directly connected to the fact that in both *Nollan* and *Dolan*, the government was using its power to exact from the property owner an agreement to do something without compensation that would clearly constitute a taking if government stepped in and did it itself.

In *Dolan*, the city conditioned approval of Dolan's permit to expand the building that housed her business on the dedication of a portion of her property for a storm drainage system and a pedestrian/bicycle pathway. *Id.* at 380. The Court found that a nexus did exist between the dedication sought and the interests the government sought to preserve. *Id.* at 387. However, the Court went further and required "rough proportionality" between the exaction and the government interest, *i.e.*, "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. In *Dolan*, the Court found

that the dedication of a greenway was sufficiently related to flood control to justify a dedication, but that the requirement that the greenway be open to the public and that the property owner give up her right to exclude others from that portion of her property combined to render the exaction a taking. *Id.* at 393-94.

The reasoning in *Nollan* and *Dolan* does not support extending the rough proportionality standard to regulatory takings. If the government in either case sought to create an easement for access to the beach or flood drainage, it would clearly have had to pay the property owner for the property or the physical intrusion created by the loss of the ability to exclude others. It does not follow, however, that the government's action would have constituted a taking if a regulation had been passed, or a permit denied, prohibiting building that blocked public access to the beach or prohibiting building that interfered with flood drainage. In those cases, a taking would have occurred only if the regulation or permit denial resulted in the elimination of any economically viable use of the land or other drastic damage to fundamental aspects of the owner's property rights. Thus, the Ninth Circuit's extension of the *Dolan* rough proportionality standard to regulatory takings cases where no exaction is sought is neither supported by *Nollan* and *Dolan*, nor consistent with regulatory takings law generally.

## CONCLUSION

For all of the foregoing reasons, the Ninth Circuit decision should be reversed and remanded.

Respectfully submitted,

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In The  
**Supreme Court of the United States**

October Term, 1997

CITY OF MONTEREY,

*Petitioner,*

v.

DEL MONTE DUNES AT MONTEREY, LTD. and  
MONTEREY-DEL MONTE DUNES CORPORATION,

*Respondents.*

*On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit*

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**BRIEF OF AMICUS CURIAE THE MUNICIPAL  
ART SOCIETY OF NEW YORK, INC.  
IN SUPPORT OF PETITIONER**

---

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The Municipal Art Society of New York, Inc. (the "Municipal Art Society") submits this brief, as *amicus curiae*, in support of the Petitioner and for reversal of the judgment of the Court of Appeals for the Ninth Circuit in this case reported at 95 F.3d 1422 (1996) (the "Ninth Circuit Opinion").

#### INTEREST OF *AMICUS CURIAE*<sup>1</sup>

The Municipal Art Society was founded in 1893 "to work towards the creation of a livable city . . . and particularly to use the Municipal Arts of Architecture, Landscape Architecture, Planning, Preservation and Public Art to improve and protect the physical environment of New York City."

In furtherance of that mandate, the Society has played a leading role in formulating and enacting New York City's Zoning Regulation, Landmarks Preservation Law and other land-use regulatory measures. These in turn have served as models for the rest of the nation. The Society also works with developers to achieve a fair accommodation between public and private interests in the development of particular properties and neighborhoods, the 5700-unit Riverside South development in Manhattan being a notable recent example. The Society also has filed amicus briefs in a number of regulatory taking cases before this Court, including *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The Municipal Art Society's immediate interest in this case arises from recognition that efforts to specify when regulation goes "too far" have engendered some invention, and much uncertainty. The resulting lack of predictability breeds litigation. In the experience of the Municipal Art

<sup>1</sup> Pursuant to Rule 37.6 of this Court, the Municipal Art Society states that this Brief was not authored in whole or in part by counsel for a party, and no person or entity other than the Amicus and its counsel made a monetary contribution to the preparation of this Brief.



Society, that is bad for regulators and bad for owners. It is bad for regulators because it diverts time and funds from the task of fairly accommodating public and private interests. Moreover, it "chills" the regulatory function when the threat of treasury-breaking litigation is used, as it often is, to force regulators to back off when they believe they should press forward. It is bad for owners because developers would usually far rather negotiate a less-than-"ideal" solution, knowing the likely outcome under established rules, than delay projects for years as litigation meanders to an uncertain result under vague standards or loose procedures.

The present case presents the opportunity to clarify two unsettling, and unnecessary, developments in the law of regulatory takings. Both the use of juries and the application of a "reasonableness" or "rough proportionality" standard to governmental planning decisions would very substantially increase the unpredictability of litigation in this field. The use of juries would have this consequence because juries may come to different verdicts on exactly the same regulation applied to neighboring parcels under identical circumstances. The reasonableness standard (especially when loaded with burden-heightening innuendo such as "rough proportionality") would do the same because it would allow courts to second-guess the deliberations of expert and politically responsive bodies, with uncertain results.

### SUMMARY OF ARGUMENT

In all "takings" cases, the only relevant inquiry is whether the owner has satisfied all three prongs of the Takings Clause. These are that (a) the subject of the taking must be "property," (b) the property must be "taken," and (c) the "taking" must be "for public use." If all these elements are satisfied, the owner becomes entitled to "just compensation." If any one is missing—such as where a regulation does not serve a "public use"—the owner is not entitled to "just compensation" under the Fifth Amendment,

although he may still obtain some other statutory or constitutional remedy.

This case raises substantive and procedural issues about how courts conduct this inquiry. As a matter of substance, courts have long shown great deference to government determinations concerning the "public use" prong of this test. The applicable test has been formulated under a variety of labels, including "public use," "public purpose," and "substantial advancement of legitimate state interests," but, no matter what the label, it has always been construed as requiring no more than a determination that there is a rational basis for both the decision to regulate or otherwise act and the means chosen to implement the decision. Such was the case when federal, state and local governments first took land through their powers of eminent domain, and it has remained the case since this Court first definitively held that government regulation that went "too far" could effect a "taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

The latitude afforded to "takings" determinations as a matter of substance has been mirrored in the procedures used to judicially resolve challenges to such determinations. Whether direct or indirect, "takings" determinations have generally been subject to very narrow review by courts sitting without a jury. This Court has long recognized that there is no Seventh Amendment right to a jury trial, with respect to any issue, in an eminent domain proceeding, and jury trials have been permitted in such proceedings only as expressly sanctioned by statute or state constitution. While the Court has not yet specifically so held with respect to regulatory taking claims, the vast majority of this Court's regulatory taking cases presume that all issues other than "just compensation" will be decided without a jury, and this presumption is borne out by almost universal practice in state and federal courts.

The Ninth Circuit's decision in this case would turn this precedent on its head by permitting judges and juries to second-guess the policy determinations of States, Congress, and the Executive in "takings" cases. As a threshold matter, the Ninth Circuit wrongly interpreted *dicta* in this Court's regulatory taking precedents suggesting that "just compensation" might be required where government action *either* fails to serve a public purpose *or* deprives land of all economically viable use. This disjunctive standard, which would allow landowners to recover without satisfying all prongs of the Takings Clause, is at odds with both the language of the Fifth Amendment and this Court's actual practice in its regulatory takings cases. Next, in place of the "rational basis" test for relating means to ends historically applied in both direct and indirect takings cases to satisfy the "public use" test, the Ninth Circuit mandated that a "roughly proportional" or "reasonable" relationship be shown between the "taking" and the "public use." Finally, instead of leaving the "public use" issue in the hands of the trial judge, who—accustomed to the use of balancing tests—is best equipped to resolve it rationally and consistently, the Ninth Circuit placed the "public use" issue in the hands of juries which are likely to decide it on an *ad hoc*, non-uniform basis that would lead to inconsistent results even where the facts are the same and a single regulation involved.

#### POINT I

#### GOVERNMENT "TAKINGS" OF LAND, WHETHER DIRECT OR INDIRECT, HAVE HISTORICALLY BEEN SUBJECT TO REVIEW BY THE COURT ALONE, ACTING WITHOUT A JURY

The Seventh Amendment does not require a jury trial when an inverse condemnation or regulatory taking claim is

asserted in federal court by way of 42 U.S.C. § 1983.<sup>2</sup> Under both the "historical" and "functional" tests applied to decide Seventh Amendment entitlement to a jury trial, regulatory taking liability issues should be determined by the court.

#### A. THE RIGHT TO A JURY TRIAL IS DETERMINED BY APPLICATION OF THIS COURT'S "HISTORICAL" OR "FUNCTIONAL" JURY RIGHT TESTS

In deciding what types of proceedings and issues entitle a litigant to a jury trial under the Seventh Amendment, this Court has long used an "historical test" that asks first how the claim or issue, or its closest analogue, was treated in 1791. The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Since Justice Story's day, this Court has understood "the right of trial by jury thus preserved is the right which existed under English common law when the amendment was adopted." *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); see *Feltner v. Columbia Pictures Television*, 118 S.Ct. 1279, 1284 (1998).

<sup>2</sup> The fact that Del Monte's regulatory taking claims were asserted in a federal court by means of 42 U.S.C. § 1983 is immaterial. Section 1983 is a mere conduit, used for the vindication of rights guaranteed by the federal Constitution. Section 1983 in and of itself confers no substantive rights and prescribes no specific remedies or procedures beyond providing that Section 1983 claims may be asserted in an "action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. Under this broad mandate, when a regulatory takings claim is asserted under Section 1983, the proceeding in which it is asserted is best characterized as neither an "action at law" nor a "suit in equity," but rather as an "other proper proceeding for redress," with any entitlement to a jury trial judged by reference to the Fifth Amendment content of the claim rather than analogy to other claims assertable under 42 U.S.C. § 1983.



"In keeping with [its] long-standing adherence to this 'historical test,'" the Court has generally asked, "first, whether we are dealing with a cause of action that either was tried at law at the time of the Founding or is at least analogous to one that was." *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996). In this process, the Court must search the English common law for "appropriate analogies" rather than a "precisely analogous common-law cause of action." *Tull v. United States*, 481 U.S. 412, 420-21 (1987). Only if the "historical test" does not furnish answers must the Court resort to a "functional test," and thus look to other considerations, such as the distinction between fact and law, the nature of the remedy sought, and the relative capacities of judges and juries. *See Markman*, 517 U.S. at 384 n.10.

**B. GOVERNMENTAL TAKINGS, BOTH  
DIRECT AND INDIRECT, HAVE  
HISTORICALLY BEEN SUBJECT  
TO REVIEW BY COURTS ALONE**

Whether in 1791, or later, no jury trial right has ever attached to the liability issues raised by "takings" claims. In keeping with this history, this Court has long recognized that there is no Seventh Amendment right to a jury trial, with respect to any issue, in an eminent domain proceeding, and jury trials have been permitted in such proceedings only as expressly sanctioned by statute or state constitution. While the Court has not yet so held with respect to regulatory taking claims, neither the Court's regulatory taking case law nor current practice in federal and state courts supports the conclusion that any regulatory taking issue other than "just compensation" must or should be tried to a jury.

The fact that "takings" issues have historically never been submitted to juries is in large part attributable to the nature of the eminent domain power on which both direct and indirect takings are based. The power of eminent domain is an "attribute of sovereignty" which is "an inherent power, necessary to the very existence of the government." 1 *Nichols*

*On Eminent Domain* § 1.14[2] (1997). The power "comes into being *eo instante* with the establishment of the government and continues as long as the government endures." *Id.* It does not "require recognition by constitutional provision, but exists in absolute and unlimited form," thereby necessitating the positive assertions of limitation on its scope found in the Fifth Amendment and state eminent domain statutes. *Id.*

In the federal Constitution (and commonly also those of the States), two elements limit the power. Appropriation of land must serve a "public use," and "just compensation" must be paid. While juries have historically been permitted to assess "just compensation," whether the taking was "necessary" for a "public use" has never been deemed an issue for the jury. *See, e.g., Kingsport Utils., Inc. v. Steadman*, 139 F. Supp. 622, 623 (E.D. Tenn. 1956) ("legality of the taking is not a jury question"); *Lustine v. State Roads Comm'n*, 142 A.2d 566, 567 (Md. 1958) (whether taking was "arbitrary, capricious and unreasonable" is a question "for the court, and not the jury, to pass upon"); *Kessler v. Thompson*, 75 N.W.2d 172 (N.D. 1956); *People v. Smith*, 21 N.Y. 595 (1860). To the contrary, the proceedings in which this issue was adjudicated, while admittedly "actions at law," were most often described as "special proceedings" in which the judge determined both the facts and the law, and a jury had no role. *See Kohl v. United States*, 91 U.S. 367 (1875); *Bouton v. Potomac Edison Co.*, 418 A.2d 1168, 1170 (1980) ("Condemnation proceedings were not ordinary suits at law. Rather, they were special proceedings, lacking the characteristics of ordinary trials, brought pursuant to the power of eminent domain, a power derived from the sovereignty of the state.").

The occasional historic use of special juries in non-judicial proceedings to assist in the disposition of limited eminent domain issues should not confuse the issue:

The jury which was required in the ancient proceeding of inquest of office, by which highways were laid out in England at the time of the settlement of the American colonies, and which determined what damages would be suffered by the king or any other person, was not the common law jury of twelve presided over by a judge. . . . [T]he proceedings [in which such juries were used] were administrative and not judicial. . . . The verdict of the jury did not determine whether the way should be laid out or not; that still remained for the sovereign to determine. Thus, the proceedings were merely an administrative inquest to enable the sovereign to better determine the advisability of establishing the proposed highway, and not a judicial proceeding by which the required land was taken.

1A *Nichols On Eminent Domain* §§ 4.105[1], 4.101[1].

In light of this history, this Court long ago held that, since no right to jury trial attached to eminent domain proceedings in 1791, no such right is guaranteed by the Seventh Amendment or available in federal or state courts unless provided for by constitution, statute or rule. See *United States v. Reynolds*, 397 U.S. 14 (1970); see also *Bauman v. Ross*, 167 U.S. 548 (1897); *United States v. Jones*, 109 U.S. 513 (1883); *Secombe v. Milwaukee & St. Paul R.R.*, 90 U.S. 108 (1874); *Curtiss v. Georgetown & Alexandria Turnpike Co.*, 10 U.S. 233 (1810). Many State constitutions and statutes now provide for a jury trial in direct condemnation cases, but only with respect to the issue of "just compensation." See generally 1A *Nichols on Eminent Domain* § 4.105[3]. Federal Rule of Civil Procedure 71A also allows only the issue of "just compensation" to be tried by the jury, subject to the discretionary power of the presiding judge to instead appoint commissioners. The far

more important issue of "public use" has been left, on a near universal basis, in the hands of the court alone.

While—as the conflict in the Circuits raised in the certiorari petition in this case demonstrates—this Court has yet to definitively address whether inverse condemnation claims require a jury trial, in the overwhelming majority of the Court's regulatory taking cases all issues other than "just compensation" are presumed to have been decided without a jury, as is evidenced by the *de novo* review the Court has invariably accorded to such issues. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). The Court's presumption has been borne out by practice in the vast majority of federal and state courts, where all questions related to whether a taking has occurred or can properly occur have generally been reserved to the Court. See *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1092 (11th Cir. 1996) ("We have discovered no indication that the rule in regulatory takings cases differs from the general eminent domain framework, in which issues pertaining to whether a taking has occurred are for the court, while damages issues are the province of the jury."), *cert. denied*, 117 S.Ct. 2514 (1997); *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1550 (11th Cir.) ("the Court determines all issues, legal and factual, in an inverse condemnation suit, save the question of just compensation."), *vacated on other grounds*, 42 F.3d 626 (11th Cir. 1994); see also *Reisenauer v. Idaho*, 813 P.2d 375 (Id. 1991); *Van Dissel v. Jersey Cent. Power & Light Co.*, 438 A.2d 563 (N.J. Super. Ct. App. Div. 1981).<sup>3</sup>

<sup>3</sup> Although not directly at issue on this appeal, what constitutes "property" and when it is "taken" have also traditionally been issues for the court alone. When this Court determined that land could be "taken"



For purposes of seeking the best analogy between "old" and "new" to determine whether regulatory taking claims require jury trial, the historically demonstrable fact that such claims fit within the "general eminent domain framework" must prove ultimately dispositive. *Markman*, 517 U.S. at 378; *New Port Largo*, 93 F.3d at 1092. Indeed, the connection is more than by analogy: regulatory taking derives directly from eminent domain. As with eminent domain, inverse condemnation actions and claims of regulatory takings involve instances where government action allegedly "seizes" private property for public use, thereby triggering the Fifth Amendment obligation to pay "just compensation."

This Court itself has recognized the link on a number of occasions. Thus, in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Court observed that "the entire doctrine of inverse condemnation is predicated on the proposition that a taking [based upon the power of eminent domain] may occur without . . . formal [condemnation] proceedings." *Id.* at 316. Similarly, in his influential dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), Justice Brennan concluded that "government action other than acquisition of title, occupancy, or physical invasion can be a 'taking,' and therefore a de facto exercise of the power of

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indirectly, as by flooding, it decided the case in favor of the owner as a matter of law. *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166 (1871). When it determined that a regulation of property usage could "take" just as a direct seizure could, it decided the case in favor of the owner as a matter of law. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). When it determined that protectable "property" included "reasonable investment backed expectations," it decided the case in favor of the owner as a matter of law. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). Thus, while the concept of "taking" expanded, the view that these were issues for the court alone, sitting without a jury, remained unchanged.

*eminent domain*, where the effects completely deprive the owner of all or most of his interest in the property." *Id.* at 653. Most recently in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court, in the course of surveying the development of inverse condemnation claims, commented upon "the practical equivalence" of "negative regulation and appropriation" in the eminent domain/regulatory taking context. *Id.* at 1018-19.

In light of all the foregoing, the link between the jury right in eminent domain and regulatory taking cases is too close to be obscured, as it was in the Ninth Circuit Opinion, by issues related to the distinction between fact and law, mixed questions of fact and law, or the nature of the remedy sought. The "historical test" is all that is required for full resolution of the question against the use of a jury.

**C. EVEN IF NO HISTORICAL LINK EXISTED  
BETWEEN EMINENT DOMAIN AND REGULATORY  
TAKING CLAIMS, "FUNCTIONAL CONSIDERATIONS"  
WOULD REQUIRE DENIAL OF ANY JURY TRIAL  
RIGHT FOR REGULATORY TAKING CLAIMS**

Where the "historical test" has not provided clear answers, this Court has acknowledged that "functional considerations also play their part in the choice between judge and jury." *Markman*, 517 U.S. at 388. In such cases, the jury trial right analysis may turn "on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Id.* (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)).

Two factors, evident in the case law, militate against jury determination of liability issues on a "takings" claim—the risk of non-uniform verdicts and the deference traditionally accorded to government land-use decisions.

The risk of non-uniformity relates to the very nature of "takings" decisions. Typically, the governmental action or

regulation challenged in a direct or indirect condemnation case affects more than one parcel of property over a large geographic area. The likelihood that juries may reach inconsistent verdicts with respect to adjoining parcels or parcels forming part of a larger plan argues in favor of leaving the "public use" decision in the hands of the court. See *Kingsport Utils., Inc. v. Steadman*, 139 F. Supp. 622, 623 (E.D. Tenn. 1956) (holding that "public use" determination is not a jury question because, *inter alia*, a condemnation decision can "have a cross-country application and [can]not be confined in its application to one individual's property."); see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 863-64 (1987) (Brennan, J., dissenting) (commenting on "interdependence of land uses" and noting that "particular parcels are tied to one another in complex ways"); see generally *Sax, Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 152 (1971); cf. Fed. R. Civ. P. 71A, Advisory Committee Note (allowing federal courts to dispense with jury on "just compensation" issue in eminent domain proceedings because "the jury system tends to lack of uniformity").

Under the "functional" analysis, the risk of such non-uniform verdicts has been an adequate basis for this Court to withhold other issues, such as patent construction, from jury determination. See *Markman*, 517 U.S. at 390. It should do the same with respect to regulatory taking liability issues.

The inherently deferential standard of review applicable to government land-use decisions furnishes an additional ground for withholding "takings" liability decisions from the jury. As set forth in greater detail *infra* Point II, courts may not impose their own views of necessity for exercise of the police power and, therefore, may not invalidate a governmental decision to "take" unless it is entirely without rational basis, and consequently "arbitrary and capricious." See *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) ("deference to the legislature's 'public use' determination is

required 'until it is shown to involve an impossibility'"). Application of this "arbitrary and capricious" standard of review to government regulation and action is, under this Court's "functional" test, one of those things "that judges often do and are likely to do better than jurors." *Markman*, 517 U.S. at 388.

Application of the "arbitrary and capricious" standard has more often than not been left in the hands of the court because, as the Fourth Circuit explained in *Berry v. CIBA-Geigy Corp.*, 761 F.2d 1003, 1006-07 (4th Cir. 1985), "[t]he significance of the standard, while second nature to a judge, is not readily communicated to jurors." See *Adams v. Cyprus Amax Mineral Co.*, 954 F. Supp. 1470 (D. Col. 1997); *Sullivan v. LTV Aerospace & Defense Co.*, 82 F.3d 1251, 1259 (2d Cir. 1996); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1357 (9th Cir. 1984); *Wardle v. Central States S.E. & S.W. Areas Pension Fund*, 627 F.2d 820, 829-30 (7th Cir. 1980).

Application of this standard in an area as procedurally developed and politically charged as land-use planning would call for even more context-sensitive review of challenged decisions. As a result, the trier of fact on liability issues in a regulatory taking, no less than in a patent case, could be said to engage necessarily in "a special occupation, requiring, like all others, special training and practice." *Markman*, 517 U.S. at 388. Thus, with respect to such issues, "[t]he judge, from his training and discipline, is more likely to give a proper interpretation to such [issues] than a jury; and he is, therefore, more likely to be right, in performing such a duty, than a jury can be expected to be." *Id.* at 388-89.

Accordingly, by resort to either the "historical test" or a "functional analysis," the Court should conclude that nothing in the history or nature of regulatory taking claims warrants that such claims be tried to a jury.



## POINT II

### THE NINTH CIRCUIT ERRED BY FINDING ALTERNATIVE BASES FOR LIABILITY ON REGULATORY TAKING CLAIMS AND APPLYING OTHER THAN A "RATIONAL BASIS" TEST TO DETERMINE SATISFACTION OF THE "PUBLIC USE" PRONG OF THE TAKINGS CLAUSE

The Ninth Circuit compounded its error in submitting Del Monte's regulatory taking claim to the jury by (1) incorrectly holding that the jury could find against the City of Monterey if the City's actions *either* did not satisfy a "public use" test *or* deprived Del Monte of all "economically viable use" for its property; and (2) improperly applying a "rough proportionality" and/or "reasonableness" standard to the "public use" prong of the regulatory taking analysis.

#### A. A REGULATORY TAKING CLAIM WILL ONLY LIE WHEN BOTH PRONGS OF THE *AGINS* STANDARD ARE SATISFIED

As a threshold matter, the Ninth Circuit erred by finding two separate and alternative bases for liability on regulatory taking claims. In upholding the jury instructions in the trial court, the Circuit Court concluded that "[t]o prevail on its inverse condemnation claim, Del Monte had to show that the City's actions (1) did not substantially advance a legitimate public purpose; *or* (2) denied [Del Monte] economically viable use of its property." 95 F.3d at 1428 (emphasis added). By stating this standard in disjunctive terms, and thus assuming the existence of two independent theories of regulatory taking liability, the Ninth Circuit took to a new and problematic extreme an incorrect interpretation of this Court's precedent governing recovery for regulatory "takings."

The better reading of this precedent is, as set forth *infra*, that there is only one theory of regulatory taking liability, and it dictates that a regulatory taking claim will only lie where a

government regulation or action both satisfies the "public use" test and either physically occupies property or deprives property of all economically viable use. If government regulation or action cannot satisfy the "public use" test, and thus does not "substantially advance a legitimate state interest," it cannot amount to a taking and must be evaluated outside the Takings Clause. The Ninth Circuit Opinion ignores this basic premise, and would allow landowners to recover for purported "takings" by showing, *at their option*, *either* that challenged actions or regulations did not satisfy a "public use" test; *or* that the same actions or regulations deprived the property at issue of all "economically viable use."

#### 1. *The Ninth Circuit Improperly Construed The Agins And Penn Central Two-Part Standard*

In so holding, the Ninth Circuit relied, directly or indirectly, on statements in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and *Agins v. City of Tiburon*, 447 U.S. 255 (1980), which appear to support such a disjunctive standard. In *Agins*, the Court suggested, in a statement that has been repeated in virtually every Supreme Court "takings" case since, that a regulatory taking claim would lie where government action *either* "does not substantially advance legitimate state interests" *or* "denies an owner economically viable use of its property." 447 U.S. at 260. The *Agins* standard echoed, in turn, the Court's suggestion in *Penn Central* that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, *or* perhaps if it has an unduly harsh impact on the owner's use of the property." 438 U.S. at 127.

While *Agins* and *Penn Central* say what they say, until the Ninth Circuit Opinion few, if any, courts had applied the disjunctive standard literally. See *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 390 (1988). Most courts,

including this Court in its later non-"exaction" precedents, had simply repeated the *Agins* two-part standard, found that the action or regulation "substantially advance[d] legitimate state interests," and went on to decide the case (if at all) on the basis of the "economically viable use" test—with no consequent need to decide whether failure to satisfy the "substantially advance" test could in and of itself give rise to a claim. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485-87 (1987) (concluding that Pennsylvania Subsidence Act "advanced a legitimate state interest" and thus never assessing the fate of the claim if the Subsidence Act had not passed muster as a "public use"); see, e.g., *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995); *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991); *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070, 1080 (5th Cir. 1989); *Naegle Outdoor Advert., Inc. v. City of Durham*, 844 F.2d 172 (4th Cir. 1988); *Chang v. United States*, 859 F.2d 893, 896 (Fed. Cir. 1988); *Park Ave. Tower Assocs. v. City of New York*, 746 F.2d 135 (2d Cir. 1984).

In so doing, these courts, in effect, treated the *Agins* two-part standard as if it were conjunctive rather than disjunctive, and thus properly viewed as a variation on the "public use" and "taking" requirements of eminent domain cases. Under this construction, a compensable taking requires government action that "substantially advances" a public purpose (thus satisfying the "public use" prong of the Takings Clause) and that deprives property of "economically viable use" (thereby satisfying the "taking" prong of the Takings Clause).

The Ninth Circuit concluded otherwise, holding that the *Agins* standard is expressly disjunctive and requires the payment of "just compensation" either when government regulation does not serve a "legitimate state interest" or effects economic deprivation. In so doing, it presented the Court with an opportunity to end the confusion over the *Agins* standard by clarifying the standard so as to comport

more fully with both the language of the Takings Clause and its own regulatory taking precedents.

**2. *The Disjunctive Standard Adopted By  
The Ninth Circuit Comports With Neither  
The Language Of The Takings Clause  
Nor The Court's "Takings" Precedents***

There is no "regulatory takings" clause of the Constitution, so the proper scope of liability for regulatory takings—including whether the standard is disjunctive or conjunctive—must rest on the words of the Fifth Amendment. The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." This language sets out three separate requirements, each of which must be satisfied before the payment of "just compensation" will be required: (1) the subject of the government action must be "property"; (2) the "property" must be "taken"; and (3) the "taking" must be for a "public use."

All three of these elements must be satisfied. However, the threshold requirement for any takings claim, without which no claim seeking "just compensation" can lie, is that the government's seizure (direct or indirect) be for a "public use." 1A *Nichols On Eminent Domain* § 4.1 (1997). This has long been recognized in eminent domain proceedings. Subject to according a high degree of deference, the court may inquire whether the "goal" of the "taking" constitutes a "public use" and whether the means adopted to achieve the goal are rational. When these questions are answered in the affirmative, the government has the absolute right to "take," subject only to the obligation to pay just compensation. See *Berman v. Parker*, 348 U.S. 26, 33 (1954) ("Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear."). If, however, it is shown that the property was to be taken for other than "public use," or that the means chosen to achieve an otherwise legitimate end lack a rational basis, the



condemnation cannot proceed, and no obligation to pay compensation ever arises because the government's attempt to "take" is void. See *Thompson v. Consolidated Gas Utils. Corp.*, 300 U.S. 55, 80 (1937) ("one person's property may not be taken for benefit of another private person without a justifying public purpose, even though compensation be paid"); see also *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Cincinnati v. Vester*, 281 U.S. 439 (1930); *Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403 (1896).

That the taking must serve a public purpose also has long been recognized as a necessary predicate for regulatory taking claims. Indeed, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and in most regulatory taking cases since, the courts have assumed that the regulations or actions at issue must themselves serve a public purpose. This Court expressly acknowledged this premise in *First English* in observing that the Fifth Amendment, in a regulatory taking context, "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (emphasis added); see *Keystone*, 480 U.S. at 511 ("the existence of such a public purpose is merely a necessary prerequisite to the government's exercise of its taking power").

Since at least *Agins*, the Court has generally framed its evaluation of whether government regulation or action is, for these purposes, "otherwise proper" in terms of whether it "substantially advances legitimate state interests." Thus, in *Agins*, the Court acknowledged the need to undertake a Takings Clause "public use" analysis. It then proceeded to conduct such an analysis under the rubric of "substantial advancement," with reference chiefly to *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), a prototypical "public use" case, where deference was shown for the government's

exercise of the police power. Similarly, in his influential dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), Justice Brennan collapsed the "public use" and "substantial advancement" tests by observing that all "police power regulations *must be substantially related to the advancement* of the public health, safety, morals or general welfare." 450 U.S. at 656 (emphasis added). Most recently in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court characterized the "substantial advancement" test as a later "formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value," and therefore equivalent to the traditional "public use" test.<sup>4</sup> 505 U.S. at 1024, 1026. Thus, the Court, implicitly or explicitly, has treated "public use" and "substantial advancement" as a unitary standard and used the "substantially advance legitimate state interests" formula as a vehicle for conducting the same threshold "public use" analysis with respect to regulatory taking claims that it had traditionally conducted with respect to eminent domain claims.<sup>5</sup>

<sup>4</sup> The Court's equation of the "public use" and "substantial advancement" tests is further supported by the origin of the latter test. *Agins* and *Penn Central* indicate that the phrase "substantially advance legitimate state interests" derives from *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), a substantive due process case which buries the phrase "substantial relation" in an overwhelmingly "rational basis" context: "a court should not set aside the determination of public officers in such a matter unless it is clear that their action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety, or the public welfare in its proper sense.'" 277 U.S. at 187-88.

<sup>5</sup> The lone statement to the contrary is the Court's suggestion in *Nollan* that "the standards for takings challenges, due process challenges, and equal protection challenges are [not] identical" and that the test as to takings might be more stringent. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 n.3 (1987). However, *Nollan* was an exaction case,

*Continued on next page*

The Court has also acknowledged, in the regulatory taking no less than in the eminent domain context, that when the challenged action or regulation fails this "substantial advancement" test, the available remedies lie outside the Takings Clause. This principle was most clearly articulated by Justice Brennan in his *San Diego Gas* dissent. Justice Brennan there assumed, as the Court has done less explicitly in other cases, that it is the benefit to the public that warrants "just compensation." *Id.* at 656. However, where there is no benefit to the public because the regulation is not "otherwise proper," and thus does not "substantially advance a legitimate state interest," the Takings Clause provides no monetary remedy to the injured party:

A different case may arise where a police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare so that there may be no "public use." Although [under such circumstances] the government entity may not be forced to pay just compensation under the Fifth Amendment, the landowner may nevertheless have a damages cause of action under 42 U.S.C. § 1983 for a Fourteenth Amendment due process violation.

*San Diego*, 450 U.S. at 656 n.23; see *First English*, 482 U.S. at 315; *Carson Harbor Village v. City of Carson*, 37 F.3d 468, 473 n.4 (9th Cir. 1994) ("When the effects of a regulation do not 'substantially advance a legitimate state interest,' compensation is not automatically due. Rather, the proper remedy for invalid exercise of the police power is

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not an ordinary regulatory taking case, so, as discussed in greater detail *infra* Point II.B, the standard it prescribes cannot and should not be applied outside the exaction context.

amendment or withdrawal of the regulation and, if authorized and appropriate, damages.")<sup>6</sup>

Subsequent courts, including the Ninth Circuit in this case, have failed to acknowledge these fundamental premises of "takings" jurisprudence. The resulting misinterpretation of the *Agins* standard has not wrought more havoc to date because, as explained *supra*, the vast majority of courts applying this standard, including this Court, have found the "legitimate state interest" or "public use" prong satisfied. Such, however, is not the case here. To the contrary, the Ninth Circuit Opinion squarely presents the question of whether landowners can recover for purported "takings" by showing, at their option, *either* that challenged actions or regulations did not satisfy a "public use" test; *or* that the same actions or regulations deprived the property at issue of all "economically viable use."

The answer to this question, we respectfully submit, should be no. A regulatory taking claim will only lie when based on a regulation that serves a "public use," so in order to state a claim a landowner must demonstrate to the court that: (1) the challenged regulation or action satisfies the "public use" or "substantial advancement" test; and (2) only if this is the case, that the regulation deprived the plaintiff of all economically viable use for its property or otherwise "took" the plaintiff's property. If the plaintiff cannot satisfy the first prong of this test, the regulation is invalid and the landowner cannot recover "just compensation" under the Takings Clause, although it may have damages claims under due

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<sup>6</sup> The distinction in remedies is not idle. "Just compensation" has a special meaning differing from damages or fair market value. It denotes fairness, equality and justness—not only to the owner but to the public that must pay. See *Bauman v. Ross*, 167 U.S. 548 (1897); *United States v. 158.24 Acres of Land*, 696 F.2d 559 (8th Cir. 1982).



process, equal protection, or other constitutional or statutory theories of liability.

**B. THE "LEGITIMATE STATE INTEREST" OR "PUBLIC USE" PRONG OF THE REGULATORY TAKING TEST MUST BE EVALUATED UNDER A RATIONAL BASIS STANDARD**

The Ninth Circuit also erred by holding that the "legitimate state interest" or "public use" issue should be decided by reference to a "roughly proportional" and/or "reasonableness" rather than a "rational basis" standard. The "rough proportionality" test is properly applied only in exaction cases such as *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), where the possibility of government extortion calls for a standard that can distinguish legitimate trade-off from illegitimate extortion. Where the government action does not involve an exaction, the Court should accord substantial deference to state or local government. In such instances, the standard of review properly applicable to the "public use" issue must be the "rational basis" standard that has always been applied to test the government's exercise (directly and indirectly) of its power of eminent domain.

**1. Regulatory Takings Must Be Evaluated Under The Same Deferential "Public Use" Standard As Eminent Domain Takings**

The Ninth Circuit held that the City of Monterey could only have shown that its actions "substantially advanced a legitimate state interest," and thus satisfied the "public use" prong of the regulatory taking test, by demonstrating that those actions, at a minimum, bore a "reasonable relationship" to its legitimate public purpose of environmental protection. 95 F.3d at 1429. In so doing, the Ninth Circuit underestimated both the deference traditionally accorded to government land-use decisions and the historical and practical links between eminent domain and regulatory taking claims, and consequently imposed on the "public use" prong

of the regulatory taking test a more stringent standard than warranted by controlling precedent or any other relevant considerations. This standard should be rejected by this Court.

The standard of review traditionally applied in eminent domain cases to assess whether property is taken for "public use"—and is thus a proper exercise of the eminent domain power—is extremely narrow and inherently deferential. As the Court held in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), what constitutes "public use" is "coterminous with the scope of the sovereign's police powers," and the determination as to what constitutes "public use" under any particular circumstance is left exclusively to the discretion of the legislature. *Id.* at 240. "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Berman v. Parker*, 348 U.S. 26, 32 (1954).

Under this standard, there is a role for courts to play with respect to the "public use" determination, but it is an "extremely narrow one" because "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Id.* at 32, 33. Indeed, deference to the legislature's "public use" determination is required "until it is shown to involve an impossibility," *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925), or "unless the use be palpably without reasonable foundation." *United States v. Gettysburg Elec. Ry.* 160 U.S. 668, 680 (1896). It does not even matter that the government action does not accomplish its stated goal because, "whether in fact the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature rationally could have believed that [the regulation or action] would promote its objective." *Hawaii Hous. Auth.*, 467 U.S. at 242 (quoting *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72 (1981)). Thus, when the legislature's purpose is

legitimate and its means not irrational, this Court has repeatedly held that "debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts." *Hawaii Hous. Auth.*, 467 U.S. at 242-43.

Under this standard, courts have generally only invalidated government takings on one of three bases: (1) the land was taken for "private" rather than "public use"; (2) the selection of the land to be taken was made in an "arbitrary and capricious" manner; or (3) the overall condemnation process was conducted in "bad faith." See generally 1A *Nichols On Eminent Domain* § 4.11[2]; see, e.g., *United States v. 416.81 Acres of Land*, 514 F.2d 627 (7th Cir. 1975); *United States v. 58.16 Acres of Land*, 478 F.2d 1055 (7th Cir. 1973); *Huntington Park Redev. Agency v. Norm's Slauson*, 219 Cal. Rptr. 365 (Cal. Ct. App. 1985); *Thompson v. Consolidated Gas Utils. Corp.*, 300 U.S. 55, 80 (1937); *Cincinnati v. Vester*, 281 U.S. 439 (1930); *Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403 (1896). The courts have applied these exceptions sparingly.

There is no reason why the standard of review as to "public use" should be any different for regulatory taking claims than it is for eminent domain claims. As demonstrated *supra* Point I, the historical links between regulatory taking and eminent domain claims are extensive and compelling. The Court has looked to eminent domain jurisprudence for guidance as to both the substantive and procedural development of regulatory taking precedent. See *supra* Point I.B. Moreover, although this Court has formulated the standard in terms of "public use" in the eminent domain context and "substantially advancing legitimate state interests" in the regulatory taking context, the inquiry is the same in both contexts: Does government action lack a public purpose or any rational relationship to a public purpose so as to preclude government exercise of its otherwise sovereign power of eminent domain? It does not

matter that the government action in one case is by way of direct condemnation and in the other by way of regulation.

In recognition of this link between direct and indirect takings, this Court has repeatedly applied the "public use" standard to determine whether a challenged regulation "substantially advances legitimate state interests" in its regulatory taking analyses. Thus, in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), the post-*Agins*, non-"exaction" case with the most extensive discussion of the "legitimate state interest" prong of the regulatory taking standard, the majority and dissenting opinions were in agreement that courts do not have "license to judge the effectiveness of legislation." *Id.* at 487 n.16. Indeed, in his dissent in *Keystone* Chief Justice Rehnquist cited, without apparent disapproval from the majority, the "public use" analysis of *Hawaii Housing Authority* as controlling, suggesting that so long as the governmental actor "rationally could have believed that [its action] would promote its objective," the "legitimate state interest" of the regulatory taking test is satisfied. *Id.* at 510 n.3.

Similarly, in *First English*—also involving a regulatory taking—the Court confirmed that "[n]othing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function 'for Congress and Congress alone to determine.'" *First English*, 482 U.S. at 321 (quoting *Hawaii Hous. Auth.*, 467 U.S. at 240). Most recently in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)—again, a regulatory taking case—the Court reaffirmed the validity of this deferential standard of review by denying that its decision in *Lucas* had the effect of "'altering the long-settled rules of review' by foisting upon the State 'the burden of showing [its] regulation is not a taking.'" *Id.* at 1016 n.6.

In light of all the foregoing, this Court should flatly reject the Ninth Circuit's attempt to change the standard of constitutional review in regulatory taking cases from one of



"rational relationship" between the challenged action and public purpose, which reflects deference to local decisionmakers, to one of "reasonableness" with a judge or jury free to find liability if it disagrees with the conclusion reached by the local legislative body.

**2. In No Event Should A "Rough Proportionality" Standard Be Applied Outside Of Exaction Cases**

Finally, the Ninth Circuit erroneously concluded that "[e]ven if the City had a legitimate interest in denying Del Monte's development application, its actions must be 'roughly proportional' to furthering that interest." 95 F.3d at 1430. It erred in so holding because the "rough proportionality" standard articulated by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), is inapplicable to cases, like the present one, where no *quid pro quo* property exactions are at issue.

The "rough proportionality" standard is a specialized analysis, developed in *Dolan*, applicable exclusively to cases where the government has demanded property exactions from landowners. Property exactions, as the Court has itself observed, differ from other types of land use regulation in at least two ways. *Dolan*, 512 U.S. at 385.

First, property exactions entail "not simply a limitation on the use [an owner] might make of [its] own parcel, but a requirement that [the owner] deed portions of the property to the city." *Dolan*, 512 U.S. at 385. The Court has always treated physical occupations of land differently; indeed, there is a presumption that a physical occupation of land amounts to a taking. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). It is consequently not surprising that the Court would be "inclined to be particularly careful," and thus apply a more stringent standard, "where the actual conveyance of property [or an easement of access] is made a condition of the lifting of a land-use restriction, since in that

context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841(1987).

Second, unlike governmental regulations that are more generally applicable, an exaction involves interchange (or bartering) between government and the individual, where the individual agrees to an additional burden in exchange for a benefit granted by the government. Justifiable exactions, however, must be distinguished from extortion. The Court in *Nollan* and *Dolan* not unreasonably chose to do so through a different and more stringent test to ensure that there is a legitimate relationship between the benefit granted and the burden exacted.

Under the *Nollan/Dolan* test, local government must "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. By requiring "rough proportionality," it rationally distinguishes between extortion and what is, or could reasonably be thought to be, a trade-off. While exacting, this standard does offer a workable formula for dealing with circumstances where government seeks to exact a *quid pro quo* from a property owner for allowing him a benefit which government need not allow.

Analytically, moreover, the *Nollan/Dolan* test applies to the "taking" prong, not to the "public use" prong of the Takings Clause. The two prongs address different issues and, while each may require a connection between certain elements, those elements differ entirely depending on whether "public use" or exaction-as-"taking" is the subject of the analysis. In the "public use" context, one examines whether the government's action relates satisfactorily to a public purpose. When considering whether an exaction relates to a taking, one examines whether the benefit conferred upon the property owner reasonably relates to the

burden imposed on him. This is not a question of rationality in selecting means to achieve ends, but of whether the benefit conferred so lacks a reasonable relationship to the exaction sought as to require the conclusion that the government was extorting rather than imposing a reasonable condition. By applying a "rough proportionality" standard, the Ninth Circuit mistakenly imported the language of the *Nollan/Dolan* test out of the "taking" arena and into the "public use" arena. The Ninth Circuit had no cause to do so in this case because, although the City's responses to earlier Del Monte applications involved conditions for granting a permit, the action under judicial review was solely the City's ultimate denial of the permit.

Nothing in *Dolan* suggests a change in the settled "public interest" standard in non-exaction regulatory taking cases, like the present one, under which a challenged action need only bear a rational relationship to a legitimate public purpose. See *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) ("Based on a close reading of *Nollan* and *Dolan*, we conclude that these cases (and the tests outlined therein) are limited to the context of development exactions where there is physical taking or its equivalent."). Here, the property owner objected to the denial of the permit, not to the conditions imposed on the granting of the permit, so the more stringent nexus test should not apply.

Nor, in light of the burdens to be imposed on local and state governments, should this Court lightly agree to take the "rough proportionality" standard and apply it in an entirely different context. The "rough proportionality" standard places the Court in a position of closely reviewing and evaluating—in effect, second-guessing—the reasoning of local government. Using this standard, the Court will be in the dubious position of questioning the expertise of the staff and legislative officials of state and local government and of substituting its own judgment for that of legislative bodies. See *Nollan*, 483 U.S. at 846 (Brennan, J., dissenting) ("State

legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation . . ."). The Court should reserve such an activist role for the most intrusive forms of government regulation, such as exactions which entail a conveyance of property or physical intrusion on property, and under all other circumstances, defer to the expertise of the local legislative bodies.

If every state and local government planning decision were subject to second-guessing of this kind, it would become ever more difficult and costly for these government bodies to effectively regulate land use. See *Nollan*, 483 U.S. at 864 (Brennan, J., dissenting) (noting importance of state and local governments having "considerable flexibility in responding to private desires for development"). The courts should not place local governments in a position where they fear acting in a proper manner to regulate land use.

In light of all of the foregoing, the Court should reject the Ninth Circuit's attempt to apply a "rough proportionality" standard. Instead, the Court should follow the Fifth Amendment and settled precedent, which require no more than a rational relationship between government action and public purpose for satisfaction of the "public use" test.

### CONCLUSION

The Court below erred in endorsing the use of a jury to decide regulatory taking liability issues and in applying a "rough proportionality" test to judge the "reasonableness" of regulatory action. In the course of doing so, it raised several ambiguities in existing statements of the law calling for this Court's clarification:

1. *Agins* suggests that the lack of "public use" and deprivation of "economically viable use" are alternative tests for finding a "taking." In fact, a seizure (or its equivalent by way of regulation) is not compensable at all under the



Takings Clause unless the government's action serves a "public use."

2. The phrase "substantially advance legitimate state interests" as a substitute for "public use" engenders confusion. Both phrases, in fact, require the same judicial deference to other branches' determinations of what police power objects and means are appropriate.

3. The "rough proportionality" and "nexus" tests set forth in *Nollan* and *Dolan* should only be applied to distinguish justifiable exactions from extortion where government seeks to exact a *quid pro quo* from a property owner for allowing him a benefit which government need not allow.

For all the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Dated: New York, New York  
June 1998

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No. 97-1235

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**In The  
Supreme Court of the United States  
October Term, 1997**

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**CITY OF MONTEREY,**  
*Petitioner,*  
**vs.**

**DEL MONTE DUNES AT MONTEREY, LTD. AND  
MONTEREY-DEL MONTE DUNES CORPORATION,**  
*Respondents.*

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**On Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit**

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**BRIEF OF  
DEFENDERS OF PROPERTY RIGHTS,  
ALLIANCE FOR AMERICA  
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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July 31, 1998

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## **QUESTION PRESENTED**

Whether trial by jury is guaranteed for all claims under 42 U.S.C. § 1983?

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Pursuant to Rule 37.3 of the Rules of this Court,  
*amici curiae* submit this brief in support of Respondents.<sup>1</sup>

Both parties have consented to the filing of this brief.

## INTEREST OF *AMICI CURIAE*

**Defenders of Property Rights** is a non-profit, public interest legal foundation dedicated to the preservation of constitutionally protected property rights. Defenders' mission is to protect those rights considered essential by the Framers of the Constitution and to promote a better understanding of the relationship among all the rights protected under the Bill of Rights. Defenders' goal of the vigorous protection of property rights recognizes the special role of federal courts in protecting those rights. Since its founding in 1991, Defenders has participated in every significant property rights case in this Court including

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<sup>1</sup> No counsel for either party authored this brief *amici curiae*, either in whole or in part. Furthermore, no persons other than *amici curiae* (their



*Phillips v. Washington Legal Found.*, No. 96-1578, 1998

U.S. LEXIS 4003 (U.S. Jan. 20, 1998); *Suitum v. Tahoe*

*Regional Planning Agency*, \_\_\_ U.S. \_\_\_, 117 S. Ct. 1659

(1997); *Bennett v. Spear*, 520 U.S. 154 (1997); *Dolan v. City*

*of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United*

*States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina*

*Coastal Council*, 505 U.S. 1003 (1992).

**Alliance for America** is a non-profit coalition of grassroots groups all across the country dedicated to making property rights a part of environmental decision-making. The Alliance represents over five hundred local organizations comprised of ranchers, teachers, homemakers, loggers, farmers, and other private individuals interested in protecting private property rights. The Alliance firmly supports the need to balance safeguarding the environment with guaranteeing the private property rights enshrined in the Constitution.

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members or counsel) contributed financially to the preparation of this brief.

## STATEMENT OF THE CASE

This case involves the alleged deprivation of rights to due process, just compensation, and equal protection secured by the Fifth and Fourteenth Amendments to the U.S. Constitution under color of state law in violation of 42 U.S.C. § 1983. The violations of Section 1983 arise from the attempts of a property owner to develop a 37-acre parcel of unimproved land located in the City of Monterey, California.

At trial, a jury awarded \$1.45 million in damages for the temporary taking, under color of state law, of Respondent's property rights secured by the Fifth and Fourteenth Amendments. Pet. App. 3.

On appeal, Petitioner argued that Respondent had no right to a jury trial under either 42 U.S.C. § 1983 or the Seventh Amendment to temporary taking claims founded upon the Fifth and Fourteenth Amendments. The Ninth Circuit rejected Petitioner's argument, concluding instead that the district court properly allowed the claims to go to the

jury. Pet. App. 10. The court below reasoned that even though Section 1983 is silent on the issue, allowing jury trials under the statute is consistent with Congress' intent in passing the law. Pet. App. 7-8. Moreover, the court below also examined Seventh Amendment jurisprudence, and found that claims that are analogous to common law actions are entitled to be tried by a jury. Pet. App. 8-9. Thus, the court below concluded that Respondent's Section 1983 claim was properly tried by a jury:

More important than the nature of the claim is the second inquiry: the type of remedy sought. . . . Del Monte seeks compensatory or "legal" damages. . . . Because legal relief is available and legal rights are asserted, we conclude that Del Monte's inverse condemnation action is an 'action at law' . . .

Pet. App. 9 (citing *Del Monte Dunes, Ltd. v. City of Monterey*, 95 F.3d 1422, 1427 (9th Cir. 1996)) (citations omitted).

## SUMMARY OF ARGUMENT

In enacting 42 U.S.C. § 1983 as a statutory cause of action to protect civil rights, Congress saw the role of federal courts as uniquely important in achieving this goal:

The very purpose of Section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law. . .

*Mitchum v. Foster*, 407 U.S. 225, 243 (1972).

Congress viewed the role of federal courts as essential in protecting civil rights; a floor statement by Representative Lowe concerning Section 1 of the Ku Klux Act of 1871, the predecessor of Section 1983, explicates the thinking of Congress in passage of the law: "The case has arisen . . . when the Federal Government must resort to its own agencies to carry its own authority into execution. Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." Cong. Globe, 42<sup>nd</sup> Cong., 1<sup>st</sup> Sess., App. 68



(1871), quoted in *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 725 (1989).<sup>2</sup>

The constitutional right to a trial by jury embodied in the Seventh Amendment enhances the role of courts in accomplishing their role in the protection of individual rights by providing a check against biased judges.<sup>3</sup> See, e.g., Alexander Hamilton, *The Federalist* No. 83, 562 (J. Cooke ed. 1961)(stating that the right to a trial by jury serves as a check or “barrier to the tyranny of popular magistrates.”); see also Rep. Gerry urging “the necessity of Juries to guard against corrupt Judges,” 2 *Records of the Federal Convention* 587 (Max Farrand ed., 1911).

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<sup>2</sup> Not only has Congress expressed support for the notion that federal courts play an important role in protecting individual rights, so did the Framers of our Constitution: “But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. . . . Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be to-morrow the victim of a spirit of injustice . . .” Alexander Hamilton, *The Federalist* No. 78, 488-489 (Henry Cabot Lodge ed., 1888).

<sup>3</sup> The Seventh Amendment states that, “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-

In recognition of the importance of the right to a trial by jury in our constitutional system of individual rights and liberties, this Court has broadly construed the reach of the Seventh Amendment. See *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 749 (D.C. Cir. 1995)(“Given the importance of the constitutional right to a jury trial, we will require a new trial when that right is erroneously withheld ‘except in the rare instances in which denial of a jury demonstrably was harmless error.’”)(citing 9 Wright, Miller & Cooper § 2322, at 175).

Further, and consistent with the constitutional purpose of the Seventh Amendment, this Court has repeatedly held that, regarding statutory claims for damages that “sound basically in tort” and which are “analogous to a number of tort actions recognized at common law,” the Seventh Amendment right to a jury trial applies. See, e.g., *Curtis v. Loether*, 415 U.S. 189, 195 (1974)(“[W]hen

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examined in any Court of the United States, than according to the rules of common law.” U.S. CONST. amend. VII.

Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts . . . a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.”) and *Pernell v. Southall Realty*, 416 U.S. 363 (1974)(upholding the Seventh Amendment guarantee for a jury trial in an action for the recovery of real property where analogous actions existed at common law).

Section 1983 is a statutory cause of action that this Court has described as “a species of tort liability.” *Heck v. Humphrey*, 512 U.S. 477, 483 (1994). This Court has also held that Section 1983 is to be interpreted against a “background of tort liability.” *Monroe v. Pape*, 365 U.S. 167, 187 (1961)(overruled on other grounds by *Monell v. Dep’t of Soc. Servs. of the City of New York*, 436 U.S. 658, 663 (1978)).

Hence, several federal courts have allowed claims for damages under Section 1983 to be tried by a jury. *See, e.g., Keller v. Prince George’s County Dep’t of Soc. Servs.*, 616 F.

Supp. 540 (D. Md. 1985) and *Gargiulo v. Delsole*, 769 F.2d 77 (2d Cir. 1985).

Citing only one decision from the United States Court of Appeals for the Eleventh Circuit that has so held, Pet. Br. 24 (citing *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1092 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 2514 (1997)), Petitioner argues for an interpretation of Section 1983 that would bar claimants seeking relief for the taking of their property rights in violation of the Fifth and Fourteenth Amendments to be singled out under the statute for special treatment. However, nothing in Section 1983 or Seventh Amendment jurisprudence authorizes federal judges to pick and choose among constitutional claims for damages brought under Section 1983, favoring some with Seventh Amendment protections but not others.

The statute itself makes no distinction among the constitutional rights it protects. Indeed, it would appear to apply to *all* violations of *all* constitutional rights. *See, e.g., Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 723



(1989)(stating that Section 1983, on its face and as it was originally passed in 1871, "explicitly ordained that any 'person' acting under color of state law or custom who was responsible for the deprivation of constitutional rights would 'be liable to the party injured in any action at law.'"). Nor does the Fifth Amendment provide any basis for such a rule. The Just Compensation Clause of the Fifth Amendment is the only express money damages provision in the Constitution (it conditions the taking of private property by government for public use upon the payment of just compensation); the state commits a legally compensable wrong when it takes property without making provision for compensation, thus violating the Constitution and giving rise to a claim for damages both under the Constitution directly and under 42 U.S.C. § 1983. *Jacobs v. United States*, 290 U.S. 13, 16-17 (1933).

Since property rights are civil rights, no less than freedoms of speech, religion, press and assembly,<sup>4</sup> any rules

adopted by this Court concerning the right to a jury trial in actions for damages under Section 1983 (as well as other rules, such as ripeness) must be uniform among all claims brought for violation of "rights guaranteed by the Constitution" under 42 U.S.C. § 1983 if Congress' purpose in passing the statute is to be accomplished.

Accordingly, the court below properly analyzed and decided the issue of the Respondent's right to trial by jury, and this Court on review should affirm that decision.

## ARGUMENT

### **I. THIS COURT HAS HELD THAT THE SEVENTH AMENDMENT'S GUARANTEE OF A RIGHT TO TRIAL BY JURY APPLIES TO ACTIONS FOR DAMAGES IN FEDERAL COURT UNDER STATUTES THAT "SOUND IN TORT."**

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Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

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<sup>4</sup> "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth

Although this Court has never expressly addressed the applicability of the Seventh Amendment's<sup>5</sup> guarantee to actions brought in federal court pursuant to 42 U.S.C. §1983, this Court has repeatedly held that where the claim "sounds basically in tort" and where the remedy sought is damages ("the traditional form of relief offered in the courts of law"), there is a right to trial by jury. *Curtis v. Loether*, 415 U.S. 189, 195-96 (1974); *see also Pernell v. Southall Realty*, 416 U.S. 363 (1974); *Tull v. United States*, 481 U.S. 412 (1987)(upholding the right to jury trial for a liability issue under Section 404 of the Clean Water Act where the government sought civil penalties); *Ross v. Bernhard*, 396 U.S. 531, 538-42 (1970)(holding that an underlying substantive corporate claim in a shareholder's derivative action was legal in nature, even though such a derivative action is historically equitable); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470-73 (1962)(finding that the litigant was

<sup>5</sup> The Seventh Amendment provides that "[I]n Suits at common law . . . the right of trial by jury shall be preserved . . ." U.S. CONST. amend. VII.

entitled to jury trial even though the legal issues of the action were "incidental" to the primary equitable claim); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 503-11 (1959)(ruling that the Seventh Amendment guarantees the right to a jury trial for an antitrust counterclaim because the remedy requested was "legal" in nature).

The seminal case on this issue of the right to a trial by jury for statutory constitutional claims is *Curtis v. Loether*, 415 U.S. 189 (1974). *Curtis* involved Section 812 of Title VIII of the Civil Rights Act of 1968, enabling private plaintiffs to sue on violations of fair housing provisions. 42 U.S.C. § 3612 (1982). Congress was silent as to its intent concerning a right to a jury trial under the statute. The *Curtis* Court utilized a three-part test to determine whether the action was one sufficiently similar to an action at common law to merit a jury trial: (1) the type of relief sought; (2) the function of the action; and, (3) whether the proceeding was administrative or judicial. 9 Wright & Miller, Federal Practice and Procedure §2302.2, at 49-50 (2d ed. 1994).



Analogizing the cause of action to one in tort, the *Curtis* Court concluded that Title VIII provides a right to a trial by jury. *Curtis*, 415 U.S. at 195, n. 10. Critical to this Court's analysis of the jury trial issue was the fact that the remedy sought – actual and punitive damages – was relief traditionally obtained in courts of law. *Id.* at 196. As Justice Marshall, writing for the Court, explained:

[W]hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law. . . . A damages action under the statute sounds basically in tort – the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach. . . . More important, the relief sought here – actual and punitive damages – is the traditional form of relief offered in the courts of law.

*Curtis*, 415 U.S. at 195-96.

In *Pernell v. Southall Realty*, 416 U.S. 363 (1974), this Court looked to the nature of the remedy (damages) as a basis upon which to decide whether the Seventh Amendment

right to a trial by jury was available under a statutory framework. *Pernell* involved a District of Columbia statute, D.C. CODE §§ 16-1051 – 1505 (1981 & Supp. 1985), that established a procedure for the recovery of possession of real property. The Court concluded that, because the relief made available by the statute (damages) was the same relief afforded by a common law action, a trial by jury was available under the statute even though Congress was silent on the issue. 416 U.S. at 383. *See also Tull v. United States*, 481 U.S. 412 (1987)(focusing on the remedy sought to determine whether there is a right to a jury trial under the Seventh Amendment).

## **II. AN ACTION FOR DAMAGES UNDER 42 U.S.C. §1983 SOUNDS IN TORT.**

Although this Court has never held that an action for damages under 42 U.S.C. § 1983 is entitled to a right to trial by jury, such an action satisfies the test for a trial by jury set forth by this Court in *Curtis v. Loether*, 415 U.S. 189 (1974), and *Tull v. United States*, 481 U.S. 412 (1987). *See*

generally 1 Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation, The Law of Section 1983* §1:52, at 1-81 (4th ed. 1997).

First, 42 U.S.C. § 1983 creates a statutory cause of action with damages as a remedy for constitutional injuries:<sup>6</sup>

As a result of the new structure of law that emerged in the post-Civil War era – and especially of the Fourteenth Amendment, which was its centerpiece – the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the

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<sup>6</sup> Although Section 1983 does not, of course, create any new constitutional rights, it does create a statutory right which would not exist in its absence. Thus, for example, a person denied due process (such as a government worker terminated without a pre-termination hearing, see *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)) would have no cause of action against the individual who committed the constitutional violation because the Fourteenth Amendment only prohibits the State, and not the individual, from denying life, liberty, or property without due process. Also, since the State is immune from suit under the Eleventh Amendment, the practical result is that no damages remedy would exist at all. This is not to say that injunctive or declaratory relief might not be available, but only that a damages remedy – at least against an individual – would not lie. Indeed, Section 1983 was passed under Section 5 of the Fourteenth Amendment, authorizing Congress to implement by statute the prohibitions on the exercise of State power contained in the Fourteenth Amendment. Consequently, the statute does not simply duplicate a legal requirement already imposed by the Constitution but, rather, creates a new statutory remedy for money damages (as well as equitable relief) against individuals and municipalities to carry out the Fourteenth Amendment's prohibitions.

claimed authority of state law upon rights secured by the Constitution . . .

*Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972)(citations omitted).<sup>7</sup>

Additionally, this Court has held that Section 1983 is to be interpreted against a “background of tort liability.”

*Monroe v. Pape*, 365 U.S. 167 (1961) *overruled* (on the local government immunity issue alone) by *Monell v. Department of Soc. Servs. of the City of New York*, 436 U.S. 658 (1978).

Subsequent decisions of this Court and writings by

commentators repeatedly describe the damages remedy

provided by Section 1983 as “a species of tort.” Jack M.

Beermann, *Symposium on Section 1983: Common Law*

*Elements on the Section 1983 Action*, 72 Chi.-Kent. L. Rev.

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<sup>7</sup> Broad liability under Section 1983 is appropriate because as one commentator explained, “constitutional rights are basic to the maintenance of our form of limited, democratic government. That is why Congress passed the civil rights acts of the Reconstruction-era and why civil rights cases were granted a federal forum. Congress found enforcement of these rights so important that it granted plaintiffs the option of a federal forum even when the defendant could prove that an equally effective remedy was available in state court. . . .” Jack M. Beermann, *Symposium on Section 1983: Common Law Elements on the Section 1983 Action*, 72 Chi.-Kent. L. Rev. 695, 704 (1997).



695, 704 n. 29 (1997). See also *Heck v. Humphrey*, 512 U.S. 477, 483 (1994); *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (“The statute thus creates a species of tort liability that on its face admits of no immunities, and some have argued that should be applied as stringently as it reads.”); *Carey v. Phipps*, 435 U.S. 247, 253 (1978) (“The legislative history of §1983, elsewhere detailed, demonstrates that it was intended to ‘create a species of tort liability’ in favor of persons who are deprived of ‘rights, privileges, or immunities secured’ to them by the Constitution.”)(quoting *Imbler*, 424 U.S. 409, 417 (1976)); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 723 (1989)(Section 1983 “was designed to expose state and local officials to a new form of liability.”); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981)(“Indeed, because the 1871 Act was designed to expose state and local officials to a new form of liability, it would defeat the promise of the statute to recognize any pre-existing immunity without determining both the policies that it serves and its compatibility with the purposes of §1983.”).

In *Heck v. Humphrey*, 512 U.S. 477 (1994), an action brought by a state prisoner under Section 1983 for alleged violations of his civil rights, Justice Scalia, writing for the Court, left no doubt about the relationship between Section 1983 and tort law:

We have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability. . . . Over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under 1983 as well. . . . Thus, to determine whether there is any bar to the present suit, we look first to the common law of tort.

*Id.* at 483 (quoting *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986), and *Carey v. Phipps*, 435 U.S. 247, 257-58 (1978)).

### III. THERE IS NO BASIS FOR DISTINGUISHING AMONG CLAIMS BROUGHT FOR VIOLATION OF “RIGHTS GUARANTEED BY THE CONSTITUTION” UNDER 42 U.S.C. § 1983.

Unless this Court holds that there is no right to a jury trial under a Section 1983 damages action, there is no basis in either the Act or the Constitution to limit that right to only certain constitutional claims. On its face, the language of Section 1983 purports to apply to *all* claims for *all* rights guaranteed by the Constitution. *See, e.g., Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 723 (1989). The legislative history of Section 1983 also supports the conclusion that Congress fully intended for the statute to apply equally among all constitutional rights. For example, during the floor debates over Section 1 of the 1871 Act, Senator Edmund, who was then chairman of the Senate Judiciary Committee, making no distinction among the various provisions of the Constitution, simply stated: "The first section [of the Act] is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States . . ." Cong. Globe, 42<sup>nd</sup> Cong., 1<sup>st</sup> Sess., App. 68 (1871), *quoted in Monroe v. Pape*, 365 U.S. 167, 171 (1961) and *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 729 (1989). *See also Will v. Michigan Dep't*

*of State Police*, 491 U.S. 58, 66 (1989)("[A] principle purpose behind the enactment of §1983 was to provide a federal forum for civil rights claims. . . .").

If Congress' purpose in passing the statute is to be accomplished, any rules adopted by this Court concerning the right to a jury trial in actions for damages under Section 1983 (as well as other rules, such as ripeness) must be uniform among all claims brought for violation of "rights guaranteed by the Constitution" under 42 U.S.C. § 1983. Property rights are civil rights, no less than freedoms of speech, religion, press and assembly, and must not be "relegated to the status of a poor relation in these comparable circumstances."

*Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).<sup>8</sup>

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<sup>8</sup> Petitioner confuses the constitutional right to just compensation with the damages remedy under Section 1983, characterizing the 1983 claim as "inverse condemnation." As this Court has repeatedly held, however, the right to just compensation for taking of private property arises not from statutes or regulations, but from the Constitution itself. *See Jacobs v. United States*, 290 U.S. 13 (1933); *see also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 339 (1987)(Stevens, J., dissenting). Indeed, in order to bring an action for violation of the constitutional right to just compensation, the plaintiff must ordinarily first bring an inverse condemnation claim in state court to establish that state law does not in fact provide him just compensation. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S.



## CONCLUSION

For all of these reasons, *amici curiae* urge this Court to affirm the decision below.

Respectfully submitted,

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172 (1985). Only after the plaintiff has exhausted his inverse condemnation remedy may he file a statutory claim in federal court under Section 1983 to recover damages for violation of the constitutional right to be paid for the property taken. As Petitioner itself seems to concede, if the Section 1983 remedy is merely a second, sequential inverse condemnation claim, it would always be precluded by the decision in the prior state case – leaving no 1983 remedy at all. Such an interpretation would provide a money damages remedy for every other constitutional violation committed under color of state law, excluding only the taking of private property without just compensation. Nothing in the text or history of the statute supports such an exception to the salutary requirement that state officers who deny constitutional rights should be held accountable.

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No. 97-1235

**FILED**

**JUL 29 1998**

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

**In the  
Supreme Court of the United States  
October Term, 1997**

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**CITY OF MONTEREY,**  
*Petitioner,*

**v.**

**DEL MONTE DUNES AT MONTEREY, LTD., et al.,**  
*Respondents.*

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**On Writ of Certiorari to the United States Court of  
Appeals for the Ninth Circuit**

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**BRIEF OF AMICI CURIAE PACIFIC  
LEGAL FOUNDATION AND THE BUILDING  
INDUSTRY ASSOCIATION OF WASHINGTON  
IN SUPPORT OF RESPONDENT**

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## QUESTIONS PRESENTED

1. In determining whether a government action denying the right to use property substantially advances a legitimate governmental interest, must a court take the government's word at face value or should it carefully weigh all the evidence presented by the parties?

2. When a government repeatedly denies the right to put real property to reasonable use, does a court have a duty to determine whether the government action substantially advances a legitimate governmental interest by examining the reasonableness of the relationship between the permit denials and any harms to the public health, safety, or welfare that might be caused by the use of the property?

3. Is a jury trial available in an action brought pursuant to 42 U.S.C. § 1983 seeking compensation for takings of private property?

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## INTEREST OF AMICI<sup>1</sup>

For 24 years Pacific Legal Foundation has been litigating in support of the right of individuals to make reasonable use of their private property. Pacific Legal Foundation attorneys have been before this Court on two occasions for the purpose of representing individuals whose right to use their property was unlawfully taken by government agencies. See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997). It has participated as a friend of the court in virtually every major real property takings case that this Court has heard in the past two decades. Its attorneys are also counsel of record in four pending petitions for writ of certiorari that seek this Court's review of lower court decisions that have vitiated key components of the Takings Clause and this Court's decisions that have expounded upon the doctrine of regulatory takings. See *K & K Construction Company, Inc. v. Michigan Department of Natural Resources*, No. 97-1957 (filed June 4, 1998); *Bell v. City of Virginia Beach*, No. 97-2061 (filed June 22, 1998); *Lechuza Villas West v. California Coastal Commission*, No. 98-30 (filed June 30, 1998); and *Dodd v. Hood River County*, No. 98-54 (filed July 1, 1998).

The Building Industry Association of Washington (BIAW) is a trade association representing more than 7,700 members engaged in commercial and light industrial construction and the building of most of the residential housing in the State of Washington. Many of BIAW's members frequently make application to the government for approval of development projects. If the government is free to act to deny the right to

<sup>1</sup> Pursuant to Supreme Court Rule 37.6, amici curiae Pacific Legal Foundation and the Building Industry Association of Washington affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

utilize real property without adequate judicial oversight the constitutional rights of members of BIAW will be harmed.

This amicus brief seeks to supplement the argument in respondent's brief by elucidating the manner in which the Takings Clause requires courts to evaluate regulatory actions that infringe upon the ability of persons to make reasonable use of their real property.

Pursuant to Supreme Court Rule 37, written permission from all parties for PLF to file this brief has been lodged with the Clerk of this Court.

### STATEMENT OF THE CASE

There is no doubt that 37 acres of beachfront property in Monterey, California, even though some of it was once used as an industrial site, is extraordinarily valuable property. It is valuable in the ecological sense, as so much other beachfront property is already occupied by homes and visitor accommodations. It is valuable in the context of open space as the public increasingly chooses open space over new development. And it is valuable in the economic sense, as the desire by individuals to live along the coast remains unmet by the current supply of existing homes.

The City of Monterey (City) possesses permitting authority over the development of land within its jurisdiction. It also is the home to a vocal constituency that would prefer that no more homes be built in Monterey. It is only natural that when the City was faced with an application to develop 37 acres of property it was not going to rush headlong into the approval process. Monterey is sophisticated enough, however, to know that an outright denial of any and all use would raise certain Takings Clause problems. And as the permitting process continued over the years it became clear that while Monterey desired to use the property for its own purposes, it chose not to condemn the property and pay for it, preferring instead to delay the ultimate day of reckoning.

As has been recounted in the opinions below, beginning in 1981 Del Monte Dunes at Monterey, Ltd., and its predecessor in interest Ponderosa Homes, applied for permits to use its 37 acres. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1425 (9th Cir. 1996), Petitioner's Appendix (Pet. App.) at 3 (*Del Monte II*); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1499 (9th Cir. 1990) (*Del Monte I*). While valuable, these 37 acres are not exactly pristine, once being the site of a petroleum tank farm. *Del Monte I*, 920 F.2d at 1499. Seven tank pads and an industrial complex remain on the property. *Id.* The first application was to build 344 residential units and was consistent with existing zoning. After the requisite environmental reviews, this was denied by the planning commission with the suggestion that a smaller 264 unit project would be favorably reviewed. *Id.* at 1502. That too was turned down, as were subsequent increasingly scaled back proposals of 224 and then 190 unit residential complexes, each having been developed at the suggestion of the City. *Id.*

Seeing a pattern developing, Del Monte Dunes realized that it was getting nowhere through the application route. Figuring that if the City wanted its property badly enough for open space it should pay for it, Del Monte Dunes sued. After an appeal and remand the case finally wound up back in federal district court where the court instructed the jury on whether "(1) all economically viable use of the property had been denied; or (2) whether the City's decision to reject Del Monte's development application did not substantially advance a legitimate public purpose." *Del Monte II*, Pet. App. at 5. The jury found that the City's actions took Del Monte's property and awarded Del Monte \$1.45 million.<sup>2</sup> The Court of Appeals for the Ninth Circuit affirmed.

<sup>2</sup> This amount was for a temporary taking of the property; the State of California purchased the property for \$4.5 million while the case was pending.



## SUMMARY OF ARGUMENT

Governments today are engaged in a broad array of functions, many of which can be facilitated by the use of private property. More often than not government must physically occupy or condemn property in order to achieve its goals, such as the acquisition of real property for a highway. But when government need not, as a practical matter, occupy or take title to property to achieve a legitimate end, then there is a temptation not to pay just compensation:

[R]egulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992).

When government regulations carry this risk of pressing private property into public service it is imperative that courts have the tools necessary to effect a meaningful review of the government action. It is true that courts should not second-guess a local or state government's purpose behind its decision to utilize property. Nevertheless, when determining whether the use of a particular parcel of property is appropriate, courts must employ something more than an "anything goes" standard of extreme deference. Instead courts should employ the "heightened scrutiny" utilized by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In employing these standards in a takings analysis it must be recognized that both § 1983 and the Seventh Amendment grant property owners a right to trial by jury in inverse condemnation actions. Section 1983 provides a right to jury trial

because, as this Court has affirmed on numerous occasions, an action seeking money damages is an action at law. With respect to the Seventh Amendment, a thorough historical analysis reveals that trial by jury was the norm for condemnation actions in the late Eighteenth Century; and that protestations to the contrary are not based on any meaningful historical analysis. Finally, the fact-bound, ad hoc nature of takings claims, and the close analogy between such claims and actions for debt, makes the use of a jury appropriate for the resolution of *Del Monte Dune's* claims.

## ARGUMENT

### I

#### WHEN GOVERNMENT REGULATION THREATENS TO ELIMINATE THE ABILITY TO USE REAL PROPERTY IT IS IMPERATIVE THAT COURTS PROVIDE MEANINGFUL REVIEW OF THE REGULATORY ACTION

##### A. Because the Government Has the Practical Ability to Take Property Without Invoking Its Power of Eminent Domain, It Is Imperative That the Takings Clause be Effectively Enforced by the Courts

This Court recognizes the importance of private property. *See, e.g., Dolan v. City of Tigard*, 512 U.S. at 392 ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."). It is an integral element to any system of government that seeks to preserve all manifestations of liberty. *See, e.g., Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).<sup>3</sup> It is also axiomatic that

<sup>3</sup> In *Lynch* this Court wrote:

[t]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People  
(continued...)

"while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Government today uses property for a much broader array of purposes than was contemplated in the early years of the republic. In the last century, for example, the primary use of property taken by the government was to support military and commerce purposes. See, e.g., *United States v. Russell*, 80 U.S. 623, 629-30 (1871) (compensation due for use of steamships during "rebellion"); *Head v. Amoskeag Manufacturing Co.*, 113 U.S. 9 (1885) (taking for mill); *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893) (taking of locks and dam); *Chicago, Burlington & Quincy Railway Co. v. Chicago*, 166 U.S. 226 (1897) (street extension and widening).

Starting in the late nineteenth century, however, the use by the national and state governments of the power of eminent domain has reflected the growing complexity and reach of government. Thus government has used its power of eminent domain to acquire property interests for everything from public parks, *Shoemaker v. United States*, 147 U.S. 282 (1893), to football teams, *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 68 (1982), to residential real estate, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (power used to redistribute real estate controlled by "oligopoly"), and even to Honolulu's recent controversial and questionable use of its eminent domain power to force owners of land under condominium apartment buildings

<sup>3</sup> (...continued)

have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

*Id.* at 552.

to transfer their land to the condominium apartment owners, *Richardson v. City & County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), petition for writ of cert. filed sub. nom. *Small Landowners of Oahu v. City and County of Honolulu*, No. 97-1958 (June 3, 1998).

The power of eminent domain has thus been broadly applied. Governments have been increasingly willing to use the eminent domain power to further a growing range of public purposes, and the courts recognize the applicability of the Takings Clause to purposes beyond traditional acquisitions for projects related to the military or commerce. Nevertheless, there is still a reluctance by some government agencies to assume the fiscal responsibility of paying compensation when they take the use of private property.

Government today has focused its attention on environmental and "quality of life" issues to a degree that would have been unimaginable in the first century of the Nation's history. And to achieve its goals in furthering the environmental and quality of life objectives of modern society, government need not actually take title, occupy, or otherwise physically touch private property. But it often needs the *use* of private property for these ends just as much as it needs to physically take private property for ends that are related to building a transportation infrastructure or military preparedness. In the circumstance where government must use private property to achieve its ends, it is imperative that the rights of the owners are not ignored or given short shrift by the courts.

When building a highway government cannot hide the fact that it is taking property and has little choice but to exercise its power of eminent domain. Even when building a dam and thereby flooding private property the government cannot pretend that it has not taken the flooded property, although it might try. See *Pumpelly v. Green Bay & Mississippi Canal Company*, 80 U.S. 166 (1872). In the nineteenth century, as government began to utilize private property in more indirect ways than a



direct physical invasion, the doctrine of regulatory takings developed. Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 Utah L. Rev. 1211. This doctrine originated in the states and was, for a time, utilized to a certain extent by this Court in the latter part of the Nineteenth Century. *Id.* at 1265-76.<sup>4</sup> In this century the doctrine of regulatory takings was fully embraced by this Court in *Pennsylvania Coal*.

The development of the doctrine of regulatory takings was no doubt a judicial response to the expanding scope of governmental activity. When government is able to achieve its objectives by using private property in a way that does not require it to blatantly occupy or otherwise completely take over the use, possession, and title of real property, there is a certain temptation on the part of government to avoid its responsibility to the landowner. In other words, government might take the use or value of the property without the nicety of formally invoking its power of eminent domain. In this circumstance, what is the role of the courts?

**1. The Role of the Court Is Not to Second-Guess the Governmental Purpose Behind a Direct or Regulatory Taking**

That government has expanded its role in modern society is not an issue in this case and no party has suggested that it would be appropriate for this or any court to second-guess legislative decisions to tackle new societal concerns. In the context of land acquisition by government, this Court held in *Midkiff* that so long as there was a legitimate public purpose behind a condemnation action, the "public use" requirement of the Fifth Amendment would be satisfied:

<sup>4</sup> Kobach takes issue with suggestions that the doctrine of regulatory takings was never utilized by this Court until *Pennsylvania Coal Co. v. Mahon*, explaining instead that this Court first began to embrace the doctrine in *Yates v. Milwaukee*, 77 U.S. 497 (1870).

[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.

*Midkiff*, 467 U.S. at 241.

However, the deference granted to a legislative decision to tackle a particular problem with the tool of eminent domain does *not* extend to those government actions that take private property *without* paying just compensation. Thus, *Midkiff* held that a rational relationship to a conceivable public purpose will justify not any taking, but rather a "compensated" taking. 467 U.S. at 241. As the Ninth Circuit recognized in *Richardson*, "[t]he language used throughout *Midkiff* indicates that deference to the legislative body's public use determination is required when the taking is fully compensated." 124 F.3d at 1158. The *Richardson* court concluded that, under this Court's recent regulatory takings cases, reviewing courts should apply "heightened scrutiny when the taking is uncompensated, and a more deferential standard when the taking is fully compensated." *Id.*<sup>5</sup> This case does not involve a challenge to the ability of Monterey to regulate petitioner's property, to protect coastal viewsheds, or to preserve the habitat of Smith's Blue Butterfly. The City of Monterey's decision to protect these resources is not manifestly irrational and as such would deserve deference in a due process challenge. But this is not a due process challenge and is not even a challenge to a government's decision to exercise its power of eminent domain through a compensated taking.

<sup>5</sup> Some hold to the theory that a legislative decision to pay just compensation creates a presumption that a public purpose exists. See, e.g., Laurence Tribe, *American Constitutional Law Second Edition* at 589 (1988). Such a theory, however, may be inadequate in a regulatory arena dominated more by rent seeking than the public interest. See, for example, the facts in *Richardson*.

This is a regulatory *takings* case that challenges an *uncompensated* taking. The question here is whether a court must ~~and~~ provide meaningful review of the government's action. Must a court defer to a municipality's decision to apply its regulations to an individual's property in a manner that impacts the use and value of the property when the owner alleges that the purposes of the regulatory scheme are not advanced? As will be shown, the answer is no.

**2. A Government Regulation That Restricts the Use of Real Property Must Advance a Legitimate Governmental End, Otherwise the Regulation Could Result in an Uncompensated Taking**

In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court recognized that there can be a taking when a regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land." *Id.* at 260 (citations omitted).<sup>6</sup> In this case, the lower courts found there to be a taking because the application of the regulatory scheme to Del Monte's property did not advance any legitimate governmental interests. Thus, the first part of the *Agins* formulation is at issue in this appeal and in the context of this case it is clearly a takings formulation and not relevant to a due process theory.

The parallelism between the language of due process and the first part of the *Agins* takings formulation should not be taken as a sign that the *Agins* test is anything but a takings test

<sup>6</sup> This Court has unequivocally and repeatedly referred to the *Agins* two part test in analyzing the Takings Clause. See *Dolan*, 512 U.S. at 384; *Lucas*, 505 U.S. at 1015-16; *Pennell v. City of San Jose*, 485 U.S. 1, 19 (1988) (Scalia, J., concurring and dissenting); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan v. California Coastal Commission*, 483 U.S. at 834 n.3; *United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 647 (1981) (Brennan, J., dissenting).

that, when placed before a court, deserves the heightened scrutiny that is appropriate in a takings analysis. In cases such as the present one, the legitimacy of the state interests is not in question. The regulatory goals here are arguably proper and fall squarely within the "otherwise proper" rubric of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (the Takings Clause "is designed . . . to secure compensation in the event of otherwise proper interference amounting to a taking").

The point of the first part of the *Agins* test is that when government interferes with the use and enjoyment of property in a way that does not achieve any legitimate governmental goals then the government has usurped, for all practical purposes, the incidents of ownership. A property owner, for example, is not required to provide a reason, legitimate or otherwise, to justify the owner's decision to put private property to a particular lawful use. Nor does the owner have to provide a reason for *not* putting property to a particular use. And so when government prohibits a landowner from putting property to a particular use, and when government cannot provide a legitimate reason for the prohibition—that is when it fails to substantially advance a legitimate governmental interest—then the government is acting in the manner of an owner. By restricting or prohibiting the use of private property without a valid justification, the government assumes the mantle of an owner—the government has become the owner. Thus the appropriateness of recognizing the first prong of the *Agins* test as a *takings* standard.<sup>7</sup>

<sup>7</sup> An early instance where this Court struck down a regulation as a taking because the government lacked the proper regulatory purpose occurred in *Delaware, Lackawana, & Western Railway Co. v. Morristown*, 276 U.S. 182, 195 (1928) ("the declaration of the ordinance that the specified part of the driveway 'is hereby designated . . . as [a] . . . hack stand' clearly transcends the power of regulation" and would be a taking). Some states have found takings based on the first part of the *Agins* test. See, e.g., *Seawall v. City of New York*, (continued...)



**3. In Order to Determine Whether the Prohibitory Application of a Regulation to a Property Interest Substantially Advances a Legitimate Governmental Interest, a Court Must Closely Examine the Relationship Between the Prohibition and the Goals Sought to be Achieved**

As noted above, this Court in *Nollan* observed that something more than the highly deferential standards of due process should apply when determining whether or not a government action "substantially advances" a "legitimate state interest." See 483 U.S. at 834 n.3. When the Court has employed this standard in a takings analysis, it has focused on the question whether the application of the regulation actually advances a legitimate governmental interest. Thus, in *Nollan*, the assumed otherwise proper state interest of protecting the viewshed from the obstacles created by the Nollans' new home was not advanced by a requirement that the Nollans allow people already on the public beaches to walk across their property. See *id.* at 838. In other words, the restriction imposed on the use of the Nollan's property lacked an "essential nexus" to the arguably legitimate governmental end. *Nollan*, 483 U.S. at 836-37.

In *Dolan v. City of Tigard*, 512 U.S. 374, this Court looked further at the nexus between the restriction on the use of Mrs. Dolan's property (the restriction being a refusal to grant her a permit unless she dedicated a greenway and built a bicycle path) and the state's asserted regulatory goals (relating to flooding and traffic congestion). Rejecting the "rational basis" or due process standard of review, this Court held that the City had failed to carry its burden of proving that a measure of "rough proportionality" existed between the regulatory

restriction and the government goal. 512 U.S. at 391.<sup>8</sup> By focusing on a need for an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development," *id.*, this Court made it plain that it is necessary for a court to question whether a regulatory restriction imposed on the use of real property actually advances the regulatory goals involved.<sup>9</sup>

<sup>8</sup> Another instance where "proportionality" has been found relevant to a regulatory takings analysis occurred in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 645 (1993) (considering whether the takings plaintiff bore a burden "out of proportion to its experience with the [pension plan]"), *quoted in Eastern Enterprises v. Apfel*, No. 97-42, slip op. at 28 (June 25, 1998) (plurality opinion).

<sup>9</sup> The analysis of *Nollan* and *Dolan* applies to all regulatory takings, not just to those that involve a demand for an exaction in exchange for lifting a permit denial. Thus this Court in *Yee v. City of Escondido*, 503 U.S. 519 (1992), defined the existence of a *regulatory* taking to depend on "whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Id.* at 530 (citing *Nollan*, 483 U.S. at 834-35). Because this definition of a regulatory taking based on a nexus analysis is unrelated to any "exaction" demand, the focus in a nexus analysis must be on the harm caused by the proposed use of property and any regulatory response to that perceived harm. Whether that response be a permit denial or the imposition of a condition or exaction the analysis remains the same. That is because the ultimate goal underlying any takings inquiry is "to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The only practical way to effect this goal of the Fifth Amendment is for a court to look carefully at the burden imposed upon the landowner and compare it to any harm that the use of the land might cause.

<sup>7</sup> (...continued)

542 N.E.2d 1059 (N.Y. 1989) (regulation requiring payment of housing fee is a taking because it failed to substantially advance a legitimate governmental interest).

In the present case, the City of Monterey legitimately wanted to protect its environmental resources, its "flora and fauna," including the habitat of the Smith's Blue Butterfly, and the integrity of its General Plan. *Del Monte Dunes II*, Pet. App. at 17-19. In order to determine, however, whether the denials of Del Monte's permit applications actually advanced the legitimate governmental goals it is essential that a court undertake a critical inquiry of the alleged potential impacts from Del Monte's development proposals and ask whether the alleged impacts are (1) significant enough to warrant a denial and (2) whether a permit denial would actually protect the resources.

As the court below properly found, this sort of inquiry is "essentially factual" and depends on the "reasonableness" of the government action at issue. *Del Monte II*, Pet. App. at 15 (citations and quotations omitted).

**B. To Analyze Meaningfully Whether the Landowner Is Being Forced to Bear More Than the Owner's Fair Share to Achieve a Public Purpose, a Court Must Review the Facts of the Case Rather Than Always Deferring to the Government**

This case asks whether Del Monte's property was taken; not whether the City has the authority to take the property. In this situation the normal deference paid to an agency's decision to pay just compensation for property does not apply. As this Court has made plain, when the question is whether there is an uncompensated regulatory taking, a heightened level of scrutiny of the agency decision must apply:

[O]ur opinions do not establish that these [takings] standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the

State 'could rationally have decided' that the measure might achieve the State's objective."

*Nollan v. California Coastal Commission*, 483 U.S. at 834 n.3 (citations omitted, emphasis in original).

Is a landowner seeking a use permit from a government agency a mere supplicant seeking a government favor or is the owner *entitled* to make reasonable use of the property and therefore presumed to have the right of meaningful review if the permit is denied? In *Nollan*, this Court expressed the opinion that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a "governmental benefit." *Nollan*, 483 U.S. at 833 n.2. Because the ability to use one's property is a right rather than a mere privilege it is critical that government agencies not interfere with that right unless necessary to protect public health and safety; and unless such interference avoids a "taking" of the property interest.

When government has the practical ability to achieve its goals by taking the use property without formally exercising its power of eminent domain, it is incumbent upon the courts to provide meaningful oversight. In a case such as the present one, when government is seeking to protect natural resource values, "by requiring land to be left substantially in its natural state—[the regulations] carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1018.

In the context of a permitting process, government has the ability to easily use its vast regulatory power to coopt the use of the property. It can exact onerous and unreasonable conditions in exchange for a permit. Or it can simply deny the permit outright thereby maintaining the status quo of open space or wildlife habitat. Thus this Court has well understood that when regulation of specific property is at stake, the overwhelming



power of the government must not be given carte blanche. If courts do not exercise some degree of heightened scrutiny of government actions that deny the ability to make reasonable use of property, the Takings Clause will be but little more than a mere curiosity.

As this Court warned in *Nollan*, the use of the permitting power to obtain public benefits unrelated to the purpose behind the use restriction would result in an inappropriate "leveraging of the police power." 483 U.S. 837 n.5. (use of permitting power to obtain beach path); accord *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 867-68 (use of permitting power to obtain money to build public tennis courts), *cert. denied*, 117 S. Ct. 299 (1996). In *Nollan* and *Ehrlich*, the courts carefully reviewed attempts to use the permitting power to obtain governmental benefits in the form of permit conditions. There is no logical reason, however, why the analysis should be any different if the government uses its permitting power and thereby obtains a desired benefit of open space, habitat, or simply the status quo use of real property by simply *denying* a permit. The Ninth Circuit was correct in holding the actions of the City of Monterey to a higher standard of review than one of extreme deference.

## II

### THE FACT-BOUND QUESTIONS OF "SUBSTANTIAL ADVANCEMENT" AND "ECONOMIC VIABILITY" WERE PROPERLY SUBMITTED TO A JURY

#### A. Both § 1983 and the Seventh Amendment Grant Del Monte the Right to a Trial by Jury in the Present Case

The judgment of the Ninth Circuit upholding the trial court's submission of the substantial advancement and economic viability questions to the jury should be affirmed. The statutory analysis employed by the unanimous Court in *Lorillard v. Pons*, 434 U.S. 575 (1978), strongly supports the conclusion that

42 U.S.C. § 1983 grants Del Monte a statutory right to a jury trial in the present case. Moreover, recent scholarship demonstrates that Del Monte also has a right to a jury trial under the Seventh Amendment. See Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144 (1996).

#### 1. Section 1983

The Ninth Circuit concluded that "Del Monte was entitled to have a jury try its inverse condemnation claim" asserted under § 1983. Pet. App. at 9. The major premise behind this conclusion was that "plaintiffs who bring an action *at law* under section 1983 have the right to a jury trial." Pet. App. at 7-8 (emphasis added). The minor premise was "Del Monte's inverse condemnation action is an 'action at law.'" Pet. App. at 9. As set forth below, both of these premises are correct.

Section 1983 authorizes a party who is injured by a constitutional violation committed under color of state law to bring "an action at law, suit in equity, or other proper proceeding for redress." These words derive, without change, from Section 1 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13. Although the 1871 Act did not explicitly address the question of jury trials, *Lorillard* strongly suggests that the Forty-First Congress intended all actions "at law" brought under the Act to be decided by a jury if either party so desired it.

*Lorillard* presented "the question whether there is a right to a jury trial in private civil actions for lost wages under the Age Discrimination in Employment Act of 1967 [ADEA]," a question as to which the statute was silent (like the statute here). In seeking the intent of Congress with respect to jury trial, the Court began by finding "a significant indication of Congress' intent in its directive that the ADEA be enforced in accordance with the 'powers, remedies, and *procedures*' of the [Fair Labor Standards Act]," which had long been interpreted to provide a right to a jury trial in private enforcement actions. 434 U.S.

at 580. Similarly, Section 1 of the 1871 Act directed that procedural matters in actions brought under the Act were to be governed by the Civil Rights Act of 1866 and by "other remedial laws of the United States which are in their nature applicable in such cases." 17 Stat. at 13. Those other laws, as this Court observed in a case decided within months of the 1871 Act's passage, "secured the right to either party in a suit at common law to a trial by jury." *Kearney v. Case*, 79 U.S. (12 Wall.) 275, 281 (1871) (emphasis deleted).<sup>10</sup> As *Lorillard* teaches, the Forty-First Congress "can be presumed to have had knowledge" of those laws. 434 U.S. at 581. Accordingly, by directing that proceedings under the 1871 Act be governed by existing remedial statutes, "Congress dictated that the jury trial right then available [in suits at (common) law] would also be available in private actions [at (common) law] under the [1871 Act]." *Id.* at 582-83.

As *Lorillard* further teaches, "[t]his inference is buttressed by an examination of the language Congress chose to describe the available remedies under the [1871 Act]." *Id.* at 583. The Act, like § 1983 today, empowered an injured plaintiff to bring an "action at law" or a "suit in equity" to redress constitutional

<sup>10</sup> See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77 (mandating that "the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury"); *id.* § 12, 1 Stat. at 80 (mandating that "the trial of issues in fact in the circuit courts shall, in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury"); *cf. id.* § 13, 1 Stat. at 81 (mandating that "the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury"). In 1874, these jury trial provisions were codified as §§ 566, 648, and 689, respectively, of the Revised Statutes. See *Revised Statutes of the United States* 97, 118, 128 (2d ed. 1878).

It is perhaps worth noting here that both Congress and this Court have used "at common law" and "at law" synonymously. See *Grant, supra*, at 175 n.127.

violations under color of state law. The phrase "at law," just like the word "legal" in the ADEA, was "a term of art." *Id.* From 1789 onwards, the "general rule" of federal procedure was that "the trial of issues of fact in actions at law, both in the district court and in the circuit court, 'shall be by jury.'" *Chappell v. United States*, 160 U.S. 499, 513 (1896); see also *Grant, supra*, at 168-73 (documenting the long-standing and deep-running distinction between actions "at (common) law" and suits "in equity"). Just as in *Lorillard*, therefore, "[w]e can infer . . . that by providing specifically for [redress 'at law'], Congress knew the significance of the term ['at law'], and intended that there would be a jury trial on demand to" redress constitutional violations under color of state law. 434 U.S. at 583.

It remains to consider whether Del Monte's lawsuit is an "action at law" within the meaning of the 1871 Act and now § 1983. We think this question is appropriately addressed with reference to this Court's analysis of condemnation actions. See *Grant, supra*, at 192-94. So framed, the question is an easy one, but it does not lead to the conclusion advanced by the City. As this Court has reaffirmed in numerous cases going back more than a century, a condemnation proceeding "is a suit at law, within the meaning of the constitution of the United States and the acts of congress conferring jurisdiction upon the courts of the United States." *Searl v. School District No. 2*, 124 U.S. 197, 199 (1888) (citing *Kohl v. United States*, 91 U.S. 367, 376 (1876)); see also, e.g., *Chappell*, 160 U.S. at 513 ("This proceeding for the condemnation of an interest in land . . . was, in substance and effect, an action at law." (citing *Kohl*, 91 U.S. 367)); *Metropolitan Railroad Co. v. District of Columbia*, 195 U.S. 322, 328 (1904) ("[T]he decisions of this court have settled that a condemnation proceeding . . . is, in its nature, an action at law" (citing *Kohl*, *Searl*, and *Chappell*)).

Because plaintiffs who bring an action at law under § 1983 have a statutory right to a jury trial, and because an action seeking compensation for the taking of private property is an



action at law, the Ninth Circuit correctly concluded that Del Monte was entitled to have a jury try its § 1983 claim.

## 2. The Seventh Amendment

The Seventh Amendment preserves the right to trial by jury “[i]n Suits at common law.” The City and its amici do not dispute that condemnation actions are suits at common law for purposes of the Amendment; this proposition is hardly controversial. See, e.g., *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 458 (1977) (“Condemnation was a suit at common law . . .”); *Kohl*, 91 U.S. at 376 (“The right of eminent domain always was a right at common law.”); see generally *Grant*, *supra*, at 173-76 (exhaustively demonstrating this point). Rather, the City argues that *even so*, the Seventh Amendment does not guarantee a trial by jury in condemnation proceedings because there was “no common law right to jury [trial] in eminent domain proceedings.” Pet. Br. at 22. In this argument, the City invokes a principle long enunciated by this Court: “The Seventh Amendment was declaratory of the existing law, for it required only that jury trial in suits at common law was to be ‘preserved.’ It thus did not purport to require a jury trial where none was required before.” *Atlas Roofing*, 430 U.S. at 459.

It would be difficult to contest that this Court has, on several occasions, issued statements that appear to agree with the City’s historical assessment. For example, in *United States v. Reynolds*, 397 U.S. 14 (1970), the Court relied on Professor Moore’s assessment of “[t]he practice in England and in the colonies prior to the adoption in 1791 of the Seventh Amendment, [and] the position taken by Congress contemporaneously with, and subsequent to, the adoption of the Amendment” for its statement that “there is no constitutional right to a jury eminent domain proceedings.” *Id.* at 18; accord 8 James Wm. Moore, et al., *Moore’s Federal Practice* § 38.33[4][a], at 38-125 (3d ed. 1998) (asserting that “although eminent domain proceedings were traditionally suits at common law, a jury trial right did not

exist in such actions at common law”). Likewise, *Kohl* asserted that the right of eminent domain “was not enforced through the agency of a jury . . . for many civil as well as criminal proceedings at common law were without a jury.” 91 U.S. at 376.

One could fairly argue that most if not all of the Court’s statements in this regard constituted dictum, see *Grant*, *supra*, at 162-64, 174 & n.126, but we believe that the present case calls for a more fundamental approach to the issue. Simply put, the historical assertions regarding trial by jury in eminent domain proceedings that have issued from this Court, from other courts, and from commentators are *flatly, fundamentally, and unequivocally wrong*. Contrary to those assertions, the practice in England and the 14 United States at the time the Seventh Amendment was adopted demonstrates that a jury trial right *did* exist in such actions; at that time, the right of eminent domain *was* almost universally enforced through the agency of a jury.<sup>11</sup>

<sup>11</sup> The instant brief does not itself undertake the relevant historical analysis. When one eschews the “law office history” employed by all-too-many courts and commentators, that analysis is much too detailed to fit into a portion of an amicus curiae brief. For our conclusions, we rely primarily on the *Grant* article, which actually analyzes at length the “primary materials—the statutes of England and the fourteen states composing the United States when the Seventh Amendment was ratified in 1791.” *Grant*, *supra*, at 177; see also *id.* at 177-91 (conducting a historical examination of the jury’s role in eminent domain proceedings). Based on those materials, the article concludes that “in 1791, juries almost universally intervened in eminent domain proceedings to assess compensation.” *Id.* at 187; accord *id.* at 188 (“The historical evidence is overwhelming: one can only conclude that the Seventh Amendment ‘preserves’ the right of property owners to have a jury intervene at some point in eminent domain proceedings . . . , either as part of the proceeding by which the property is taken (condemnation) or in a separate proceeding subsequent to the taking (inverse condemnation).”).

The position taken by Congress contemporaneously with, and subsequent to, the adoption of the Amendment *confirms* these points.<sup>12</sup> Accordingly, in order truly to “preserve” the right to

<sup>11</sup> (...continued)

In this conclusion, the article joins other scholarship. See George E. Butler II, *Compensable Liberty: A Historical and Political Model of the Seventh Amendment Public Law Jury*, 1 Notre Dame J. L. Ethics & Pub. Pol’y 595, 670 (1985) (“[T]here was in 1791 the near universal right in England and the states to an *ad quod damnum* jury on the issue of damages in straight condemnation actions, available (if not in the first instance) at least on appeal from an unfavorable administrative award.”); Morton Horwitz, *The Transformation of American Law, 1780-1860*, at 84 (1977) (describing “an important institutional innovation that began to appear after 1830—an increasing tendency to state legislatures to eliminate the role of the jury in assessing damages for the taking of land”).

<sup>12</sup> Only the day before it sent the Seventh Amendment (and the rest of the Bill of Rights) to the states for ratification, the First Congress enacted the Judiciary Act of 1789. That Act, which “has always been considered, in relation to [the Constitution], as a contemporaneous exposition of the highest authority,” *Marshall v. United States*, 281 U.S. 276, 301 (1930), confirmed the constitutionally significant distinction between suits at common law and actions in equity (or admiralty). As to the former category, the First Congress provided that in every one of the new federal courts created by the Act (including even this Court), “the trials of issues in fact” shall “be by jury.” See note 10, *supra*; Grant, *supra*, at 168-70. There was no exception made for eminent domain proceedings.

It is no surprise, therefore, that when such proceedings began to be initiated in the federal courts with some regularity, juries regularly intervened. See, e.g., *Kohl*, 91 U.S. at 377 (affirming the judgment in a condemnation proceeding in which “the [circuit] court instructed the jury to find and return separately the value of the estates of the lessor and the lessees”); *Chappell v. United States*, 160 U.S. at 513-14 (affirming a jury verdict of \$3,500 for the property owner and holding generally that condemnation proceedings instituted in federal

(continued...)

trial by jury in suits at common law, this Court should acknowledge the heretofore unexamined historical record and accord property owners a jury trial in actions seeking just compensation in federal district court.<sup>13</sup>

Although we do not minimize the role of *stare decisis*, we submit there is ample precedent for the Court to reexamine and modestly revise its Seventh Amendment jurisprudence in light of the foregoing. In *United States v. Gaudin*, 515 U.S. 506, 519 (1995), also a case involving the constitutional right to trial by jury (albeit under the Sixth Amendment rather than the Seventh), a unanimous Court rejected the government’s argument that “the principle of *stare decisis* requires that we deny [respondent’s] constitutional claim.” Conceding that “we cannot hold for respondent today while still adhering to the reasoning and the holding of” *Sinclair v. United States*, 279 U.S. 263 (1929), the Court voted unanimously to “repudiate” that decision. *Gaudin*, 515 U.S. at 519. The Court observed that the role of *stare decisis* “is somewhat reduced . . . in the case of a procedural rule such as this, which does not serve as a guide to lawful behavior” and “is reduced all the more when the rule is not only procedural but rests upon an interpretation of the Constitution” *Id.* at 521. Obviously, the application of the Seventh Amendment to proceedings such as the one brought by

<sup>12</sup> (...continued)

court carry with them the right to trial by jury according to the “general rule” that first found expression in 1789—even when Congress had otherwise provided that the “forms and modes” of such proceedings conform to state practice).

<sup>13</sup> Because the present action was brought in a district court against a municipality rather than against the United States, it does not raise the added complications of sovereign immunity. Cf. Grant, *supra*, at 191-205 (demonstrating that, in light of *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. at 315-16 & n.9, the United States has no immunity from suits to recover just compensation pursuant to the Fifth Amendment).



Del Monte is likewise a procedural issue that rests upon an interpretation of the Constitution.

Moreover, "*stare decisis* cannot possibly be controlling when, in addition to those factors, the decision in question has been proved manifestly erroneous." *Id.* We submit that scholarship has proved the historical underpinnings of *Reynolds* and its ilk to be precisely this—manifestly erroneous. It would be one thing if the Court had issued even one opinion that actually undertook a historical analysis and reached a sober conclusion after having marshaled and weighed the evidence. Such an opinion, even if erroneous, might more legitimately be insulated by *stare decisis*. But the Court, to our knowledge, has never issued such an opinion: the historical "analysis" contained in *Reynolds* and similar opinions consists either of mere ipse dixit pronouncements unburdened by supporting evidence or of citations to commentators who themselves make pronouncements lacking any supporting citations to original materials. These deserve no insulation from reexamination.

Finally, we note that if many of the Court's casual statements that the Seventh Amendment does not require a jury in eminent domain proceedings are pure dictum, *see Grant, supra*, at 162-64, other such statements are manifestly inconsistent with the actual cases generating those statements. For instance, in the very same opinion pronouncing that eminent domain "was not enforced through the agency of a jury," the Court in *Kohl* ratified an eminent domain proceeding instituted by the United States in federal circuit court, a proceeding in which a jury had assessed the value of the property taken. 91 U.S. at 376, 377; *see also, e.g., Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. at 244 (holding that "the last clause of the seventh amendment forbids the retrial by this court of the facts tried by the jury in the present case"); *United States v. Jones*, 109 U.S. 513, 517-18 (1883) (upholding a jury verdict against the United States, a

verdict that had increased by 25% the award rendered by three commissioners).

In sum, the Court should reexamine its Seventh Amendment jurisprudence in light of the convincing demonstration that, in 1791, juries almost universally participated in eminent domain proceedings in England and the 14 United States. As in *Gaudin*, *stare decisis* should not stand in the way of setting aside the manifestly erroneous pronouncements of prior decisions, especially where the relevant issue is both procedural and constitutional, as it is here. For this reason, and for the additional statutory reasons discussed above, this Court should affirm that Del Monte had a right to a trial by jury on its claim against the City.<sup>14</sup>

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<sup>14</sup> The amicus curiae brief of the states argues that providing a jury trial in federal court would "interfere with state sovereignty" because "if a state fails to provide a jury trial on liability, it will be faced with the possibility of having to relitigate identical issues in federal court." Brief for the States of New Jersey, et al., as Amicus Curiae in Support of Petitioner (States Brief) at 9, 13 (capitalization altered). In the first place, any interference with state sovereignty would be a necessary consequence of the long-standing and "strong federal policy against allowing state rules to disrupt the judge-jury relationship in federal courts," a policy to which state sovereignty must yield. *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 538 (1958).

But more fundamentally, the premise of the states' argument is wholly false: assigning decision-making authority in federal cases to a jury rather than to a judge simply will not alter the preclusive effect of prior state court proceedings (whatever that effect might be). As this Court held in *Parklane Hosiery v. Shore*, 439 U.S. 322 (1974), "an equitable determination [by a nonjury factfinder] can have collateral-estoppel effect in a subsequent legal action" in which determinations would be made by a jury. *Id.* at 335 (emphasis added). The states acknowledge *Parklane Hosiery* but assert that *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990), cast doubt on the earlier decision, rendering "uncertain" the preclusive (continued...)

**B. A Jury Trial in an Inverse Condemnation Action Necessarily Includes a Jury Determination of the Facts That Determine Whether the Defendant Is Liable for a Taking**

Once it is established that Del Monte had a right to a jury trial on its inverse condemnation claim against the City, it is a relatively simple task to determine whether that right included the right to have a jury determine the essential factual elements of Del Monte's claim. In its recent decision in *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384, 1389 (1996), this Court unanimously held that the question "whether a particular issue occurring within a jury trial . . . is itself necessarily a jury issue" turns on whether resolution of that issue by a jury is "essential to preserve the right to a jury's resolution of the ultimate dispute." The "ultimate dispute" with respect to Del Monte's inverse condemnation claim, as with any claim for money damages, is the existence and amount of the City's monetary liability to Del Monte. Cf. *Yasuda Fire & Marine Insurance Co. of Europe, Ltd. v. Continental Casualty Co.*,

<sup>14</sup> (...continued)

effect of juryless state court determinations in subsequent federal proceedings. See States Brief at 11-12. *Lytle* did nothing of the sort. Rather, *Lytle* explicitly reaffirmed the holding that "an equitable determination can have collateral-estoppel effect in a subsequent legal action." 494 U.S. at 550 (emphasis in original) (quoting *Parklane Hosiery*). *Lytle* then distinguished a subsequent legal action from a case that "involves one suit in which the plaintiff properly joined his legal and equitable claims." *Id.* at 553 (emphasis added). In the end, *Lytle* merely "decline[d] to extend" *Parklane Hosiery* and declined to accord collateral-estoppel effect to a very narrow category of factual determinations—"a district court's determinations of issues common to legal and equitable claims where the court resolved the equitable claims first solely because it erroneously dismissed the legal claims." That category is not even remotely implicated by a state proceeding followed by a subsequent federal one. State sovereignty is safe.

37 F.3d 345, 352 (7th Cir. 1994) (identifying "the ultimate dispute between the parties" as "the amount of money, if any, [one] owes [the other]"). By arguing that juries should not decide issues of substantial advancement or economic viability (or any other factual issues relating to whether a regulatory taking has occurred), the City essentially argues that the jury in the present case should have exercised *no role whatsoever* in determining the City's liability. That position simply cannot be squared with *Markman*'s insistence on "preserv[ing] the right to a jury's resolution of the ultimate dispute." 116 S. Ct. at 1389.

If any further analysis were required, it would merely confirm this conclusion. As *Markman* recounted, the Court has repeatedly stated that whether a particular issue is for the jury "must depend on whether the jury must shoulder this responsibility *as necessary to preserve the substance of the common-law right of trial by jury*." *Id.* at 1390 (internal quotation marks omitted, emphasis in original). It is difficult to conceive that the "substance" of the jury trial right could be preserved by a rule in which the jury is given *absolutely no say* regarding the defendant's liability. Moreover, the two means by which the court has attempted to "sharpen" this kind of analysis—"the distinction between substance and procedure" and "the line . . . between issues of fact and law"—both support the conclusion that the jury must be allowed to determine the factual elements of liability. *Id.* Can there be a matter more substantial and less procedural than whether the defendant is liable to the plaintiff? As for whether "substantial advancement" and "economic viability" are issues of fact or law, we cannot improve upon this Court's statement, most recently in *Lucas*, that a regulatory takings analysis consists of "essentially ad hoc, factual inquiries." 505 U.S. at 1015 (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)). This is self-evidently true when the question is whether the application of a regulation *to a particular parcel of property* either fails to substantially advance a legitimate state interest



*with respect to that property* or deprives *that property* of economically viable use.

Finally, of course, there is the "historical method," the device of "comparing the modern practice [under review] to earlier ones whose allocation to court or jury we do know." *Markman*, 116 S. Ct. at 1390. Because "[a]n action for inverse condemnation based upon an alleged regulatory taking did not exist, as such, when the Seventh Amendment was adopted," Pet. Br. at 22, and because condemnation actions did not involve questions of liability, a historical analysis must look to an appropriate analog.<sup>15</sup> The City and its amici denigrate trespass as an appropriate analog but do not suggest an alternative. We, however, suggest that inverse condemnation is appropriately analogized to an action in debt, the "debt" arising from the government's duty to pay just compensation for an (asserted) taking of private property. The question whether the government has committed a taking, then, may be analogized to the question whether the government actually "owes" the debt—that is, whether the government is liable to the property owner. Under this analogy, the property owner's right to a jury trial undoubtedly encompasses the issue of liability, as this Court unanimously held in *Tull v. United States*, 481 U.S. 412 (1987). Having determined that the government's action seeking civil penalties under the Clean Water Act was "clearly analogous to

<sup>15</sup> This should not be taken as a concession that the jury's role in 1791-era condemnation proceedings was confined to assessing damages only. As the statutes collected in the Grant article indicate, juries often had greater roles. See Grant, *supra* at 221, 228, 236 (reprinting Connecticut, Massachusetts, and Rhode Island highway statutes, under which the jury assisted the court in determining whether to alter the course of a highway or discontinue it altogether); *id.* at 224 (reprinting Delaware mill statute, under which the jury was authorized to determine whether a mill dam, race, or pond was "so injurious [that it] ought not to continue"); *id.* at 233 (reprinting North Carolina highway statute, under which the jury had authority to determine the existence and courses of all public roads).

the 18th-century action in debt," the *Tull* Court concluded that "petitioner has a constitutional right to a jury trial to determine his *liability* on the [government's] claims." *Id.* at 420, 425 (emphasis added). So, too, Del Monte has a constitutional right to a jury trial to determine the City's liability on its claim for compensation for a taking of private property.

For all these reasons, the Ninth Circuit correctly upheld submission of the fact-bound questions of "substantial advancement" and "economic viability" to the jury.

### CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

DATED: July, 1998.

Respectfully submitted,

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(15)  
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In The  
**Supreme Court of the United States**  
October Term, 1997

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CITY OF MONTEREY,  
*Petitioner,*  
vs.

DEL MONTE DUNES AT MONTEREY, LTD. AND  
MONTEREY-DEL MONTE DUNES CORPORATION,  
*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit

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**BRIEF OF**  
California Association of Realtors®, International  
Council of Shopping Centers, National Association of  
Realtors®, National Cattlemen's Beef Association,  
California Business Properties Association  
**AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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## QUESTIONS PRESENTED

1. Does the "rough proportionality" standard for evaluating regulatory taking cases, announced by this Court in *Dolan v. City of Tigard*, apply to land use restrictions which are the functional equivalent of exactions, as well as to exactions themselves?
2. Should this Court abandon the *ad hoc* factual inquiry in taking cases, overruling every regulatory taking case since *Penn Central Transp. Co. v. City of New York*, thus eliminating the role of the jury or judge as trier of fact?

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Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* submit this brief in support of Respondents.<sup>1</sup>

## **IDENTITIES AND INTERESTS OF *AMICI CURIAE***

**California Association of Realtors® (C.A.R.)** is a voluntary trade association representing the interests of approximately 90,000 persons licensed as real estate brokers and salespersons by the State of California. C.A.R. is actively engaged in promoting and establishing reasonable standards to govern the transfer of real estate and the protection of private property rights. C.A.R. pursues its objectives through a variety of methods, including education of its members, creation of standard form agreements for use in real estate transactions, lobbying, providing legal advice to its members, and participation as *amicus curiae* in relevant court cases.

**California Business Properties Association** is a non-profit organization which currently represents the largest commercial industrial real estate consortium in California with about 5,000 members. Its membership includes real

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<sup>1</sup> No counsel for either party authored this brief *amici curiae*, either in whole or in part. Furthermore, no persons other than *amici curiae* (their

estate developers, builders, lenders, commercial property owners, real estate brokers, major retailers and professional service corporations, including the California chapters of the National Association of Industrial and Office Projects, the Associated Builders and Contractors of California, the Society of Industrial and Office Realtors, Commercial Real Estate Women, the Institute of Real Estate Management and the Commercial Industrial Development Association.

**International Council of Shopping Centers, Inc.** is the trade association for the shopping center industry. It has over 38,000 members worldwide, over 33,500 in the United States including approximately 6,000 members in the State of California. These members include developers, owners, lenders, retailers, and all others having a professional interest in the shopping center industry. These individuals own or operate virtually all of the 43,000 shopping centers in the United States and 6,000 centers in the State of California. In 1997, these centers accounted for \$1,019.3 billion in retail sales nationally representing 53% of total retail non-automotive sales, and \$111.3 billion in sales in the State of California, representing 51% of total non-automotive retail sales. These centers employed over 10 million people

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members or counsel) contributed financially to the preparation of this brief.

nationally and over one million in the State of California, representing in both cases about 8% of non-farm employees. **National Association of Realtors® (NAR)** is a non-profit professional association incorporated in Illinois. NAR's membership includes 700,000 individuals involved in all aspects of the real estate profession, including brokerage, management, appraisal, and counseling. Members are engaged in the development and sale of residential, commercial and industrial real estate, including activities that are subject to the regulation challenged in this litigation. NAR is also a champion of the rights of real property owners. Through its participation in court cases before this Court and in others as well, NAR has long sought to preserve for property owners the rights guaranteed to them by the Fifth Amendment to the Constitution.

**National Cattlemen's Beef Association** is the marketing organization and trade association for America's one million cattle farmers and ranchers. NCBA is a consumer-focused, producer-directed organization representing the largest segment of the nation's food and fiber industry. NCBA works to achieve the vision of "[a] dynamic and profitable beef industry, which concentrates resources around a unified plan, consistently meets consumer needs and increases demand." The NCBA Dues Division oversees policy-making, governmental affairs and related activities. In this



role, NCBA is a trade association with about 40,000 individual members, 46 state cattle associations and 27 national breed organizations. Together these organizations represent more than 230,000 cattle breeders, producers, and feeders. NCBA works to advance the economic, political and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests.

### STATEMENT OF THE CASE

This action arises out of Petitioner's denial of permission to develop a 37.6-acre oceanfront parcel located within the City of Monterey, California. Respondent filed an action under 42 U.S.C. § 1983, asserting (among other claims) that Petitioner, acting under color of state law, had denied to Respondent the right to just compensation for private property that is taken for public use. The regulatory taking claim was tried to a jury, which determined that Respondent had proved by a preponderance of the evidence that the City's action either did not substantially advance a legitimate governmental interest, or that it denied to Respondent all economically viable use of the property.

At trial, Respondent presented evidence "establishing that the City progressively denied use of portions of the

Dunes until no part remained available for a use inconsistent with leaving the property in its natural state." *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1433 (9th Cir. 1996). The City denied use of the western one-third of the property "because the City wanted to retain that property for public beach use and access," imposed view shed requirements so that the development could not be seen from the public highway but must be located "in the lowest elevated area of the property, also called the 'bowl' area," and, finally, "denied it any use of the bowl area because of the risk of damage to buckwheat plants, the natural habitat of the endangered Smith's Blue Butterfly." *Del Monte Dunes*, 95 F.3d at 1433-34.

Petitioner filed various post-trial motions for New Trial and Judgment Notwithstanding the Verdict, all of which were denied, and this Petition for Writ of Certiorari followed.

### SUMMARY OF THE ARGUMENT

1. A prohibition of a certain use can transfer an interest in land from private to public ownership as effectively as a deed. From the points of view of both the owner and the public, it matters little whether a conservation easement is conveyed to the city or the land is required to be left in its natural state for the benefit of endangered species,

the coastal environment, or as a public view shed. Since each of these purposes could be accomplished equally by deed or by negative restriction on land use, the constitutional principle of rough proportionality announced by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), a case of required dedications, applies equally to land use restrictions having the same effect (if not the same legal form) as a dedication. The rule announced in *Dolan* is but a restatement of the fundamental premise underlying the just compensation clause: a single owner should not be required to bear a public burden which, in fairness and justice, should be borne by the public as a whole.

To abandon this standard of reasonableness and justice would be to desert the Fifth Amendment's promise that, where private property is taken for public use, just compensation will be paid.

2. In determining whether a regulatory taking has occurred, the *ad hoc* factual inquiry required by the precedent of this Court may be performed by a jury examining the effects of the particular restrictions upon the specific land at issue. To convert this inquiry into an issue of law, independent of all factual questions, would require this Court to overrule every regulatory taking case since *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), and to adopt a rule that would effectively eliminate judicial

review of individual land use cases. This Court rejected this precise argument in *Nollan v. California Coastal Council*, 483 U.S. 825 (1987), and *Dolan, supra*, and should do so here as well.

3. Although Petitioner claims that continuing to apply the rule, first announced in *Agins v. City of Tiburon*, 447 U.S. 225 (1980), that a landowner who proves by a preponderance of evidence that the city's action has either deprived the property of all economically viable use or that it fails to substantially advance a legitimate government interest will transfer zoning authority to federal courts, no evidence of this doomsday prophesy is presented. Rather, statistics demonstrate that less than 15% of regulatory taking claims filed in federal court ever make it to judgment, and that the majority of the remainder are decided in favor of the city. Accordingly, no reason for overruling *Agins, see supra*, *Nollan, see supra*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Dolan, see supra*, appears, and the judgment below should be affirmed.

## REASONS FOR NOT GRANTING PETITION

### I. THE *DOLAN* "ROUGH PROPORTIONALITY" STANDARD IS THE APPROPRIATE TEST FOR LAND USE RESTRICTIONS AND PERMIT DENIALS,



## **WHICH CAN TAKE PROPERTY IN THE SAME WAY EXACTIONS DO.**

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court described a “rough proportionality” standard under which the burden assumed by the landowner would be compared with the impact of the development in determining whether the landowner was being asked to bear a disproportionate burden which, in fairness and justice, should be borne by the public as a whole. Factually, that case involved a requirement that the owner dedicate by deed a portion of her property to public use. Nothing in that opinion, nor in logic, however, limits the rough proportionality principle to cases where an outright conveyance of legal title is required, nor should that opinion be read to permit municipalities to evade the rough proportionality standard by creating restrictions which unconstitutionally deprive the owner of all legitimate use of land but otherwise differ in that they lack the legal formality of a transfer of legal title.

A land use restriction which operates as the functional equivalent of an exaction of part or all of the land is therefore properly evaluated under the *Dolan* “rough proportionality” rule.

### **A. The “Rough Proportionality” Standard Properly Applies the Fundamental Principle of the**

## **Just Compensation Clause: A Property Owner Should Not Be Required to Bear a Disproportionate Burden Which, in Fairness And Justice, Should Be Borne By the Public As a Whole.**

The Constitution’s just compensation requirement “[is] designed to bar Government from forcing some people alone to bear the burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). See also *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14 (1984) (“The principle that underlies this doctrine is that, while most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of ‘the advantage of living and doing business in a civilized community,’ some are so substantial and unforeseeable, and can so easily be identified and redistributed, that ‘justice and fairness’ require that they be borne by the public as a whole.”)(quoting *Andrus v. Allard*, 444 U.S. 51, 67 (1979) quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922)(Brandeis, J., dissenting)).

The *Dolan* “rough proportionality” standard balances the legitimate community interest in land use planning with the constitutional right of the landowner to avoid bearing a disproportionate share of public needs and requirements.

We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

*Dolan*, 512 U.S. at 391.

The *Dolan* rule is predicated on the fundamental principle, described in *Lucas*, that the landowner has the constitutional right to make all uses of his property which are included within his title under background principles of property law, such as state law. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). The state may not arbitrarily prohibit such a "logically antecedent" use unless it can prove that the prohibition "substantially advances a legitimate government interest," *Dolan*, 512 U.S. 374, 385 (1994)(quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)), within the police power. In other words, the city bears the burden of identifying the harm which the proposed project is likely to cause, then to tailor its restrictions to address that threatened harm. The restriction, so tailored, will impose upon the landowner a burden which is not disproportionate to the impact of his development, but is roughly proportional to it.

As Professor Siegan points out:

The problem presented in *Dolan* is a common one under zoning. Municipalities impose regulations and exactions on the use and development of property that are intended to offset the resulting burdens that the public sustains. In all fairness, the owner should only be responsible for remedying those burdens he creates. An excessive restraint or exaction is a confiscation veiled as an exercise of the police power.

Bernard H. Siegan, *Property and Freedom: The Constitution, The Courts, and Land-Use Regulation* 149 (1997).

To ensure that the landowner was not required to bear a disproportionate share of the public burden, the *Dolan* court employed a heightened level of judicial scrutiny to the reasons put forward by the city in justification of the required exactions:

The Court's decision in *Dolan* properly balances the state's power to regulate land use and an individual's property rights. The decision also may be viewed as increasing the level of judicial scrutiny focused on development exaction schemes. The Court adopted the 'rough proportionality' standard instead of the widely-used 'reasonable relationship' standard because the Court was concerned with the proper level of judicial scrutiny. *Dolan* requires courts to scrutinize the relationship between required exactions and



the adverse impacts of proposed developments. Such scrutiny is particularly appropriate when the local government has a direct financial interest in the outcome of the decision.

Keith Kraus, *Recent Developments: Dolan v. City of Tigard: Property Owners Win the Battle but May Still Lose the War*, 48 Wash. U. J. Urb. & Contemp. L. 275, 290 (1995).

In short, *Dolan* makes clear that a landowner may be deprived of an otherwise legitimate land use only if the city can justify the deprivation as a remedy for some adverse impact of her project, and can demonstrate that the magnitude of that deprivation is quantitatively proportionate – albeit only “roughly” so – to the magnitude of the impact. Otherwise, the exaction is a confiscation of private property for public use, requiring just compensation.

**B. Land Use Restrictions Which Impose a Disproportionate Burden on the Landowner Constitute a Taking Under *Dolan* Whether Imposed by Regulation, Permit Denial, or Exaction.**

The underlying premise of so-called regulatory takings jurisprudence is the “essential similarity of regulatory ‘takings’ and other ‘takings’.” *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 651 (1981)(Brennan, J., dissenting). That similarity lies not in the transfer of title

to the government, for often the restriction does not transfer title at all. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Rather, it lies in the fact that

[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner’s point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government’s point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property.

*San Diego Gas*, 450 U.S. at 652 (Brennan, J., dissenting).

*Lucas v. South Carolina Coastal Council* provides a dramatic example of a restriction on land use which imposed a disproportionate burden on the landowner without requiring that he deed the property to the government. *Lucas*, 505 U.S. at 1019 (1992).

As this Court said in *Lucas*, citing with approval portions of Justice Brennan's *San Diego Gas* dissent,

[A]ffirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

*Lucas*, 505 U.S. at 1018.

A disproportionate restriction on land use, too, may constitute a taking, even where the owner is left with other substantial uses.<sup>2</sup> The touchstone in such analyses is proportionality to the impact of the proposed project, not conveyance of legal title. For

[t]he many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation.

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<sup>2</sup> The Court in *Dolan* expressly acknowledged that Mrs. Dolan would have been able to derive economic use from her property despite the permit conditions, but nevertheless the Court held that those conditions worked a taking.

*Lucas*, 505 U.S. at 1018-19.

Thus, it is not essential (as occurred in *Nollan*) that the owner be required to deed away his right to exclude the public in order to effectuate a taking of a private beach; in *Bell v. Town of Wells*, 557 A.2d 168, 176-77 (Me. 1989), the Supreme Court of Maine came to a virtually identical result on the basis of a legislatively-created right to public access. Accordingly, it was the inability of the owner to use its property (on the basis of flood hazard), not a requirement that the flood plain be deeded to the public, that gave rise to the taking in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

Appurtenances to land, such as water rights, may be taken without condemnation or conveyance, simply by re-directing the flows of navigable waters. See, e.g., *United States v. Cress*, 243 U.S. 316 (1917) and *Int'l Paper v. United States*, 282 U.S. 399 (1931) (both involving riparian right to undiminished flow) and *Ball v. United States*, 1 Cl. Ct. 180 (1982) (involving diminished ground water flows resulting from excavation). Mineral rights may also be taken by negative restrictions, even though no conveyance of the right is exacted. See *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 952, (1991) (coal), *Florida Rock Indus., Inc. v. United States*, 21



Cl. Ct. 161 (1990) (limestone), *Yuba Natural Resources v. United States*, 10 Cl. Ct. 486 (1986) (gold).

No reason appears why a restriction on the use of land in order to provide endangered species habitat, or a public beach, or to protect the natural coastal environment, should be analyzed differently from an exaction requiring the conveyance of a conservation easement to the government. In both cases the landowner is equally deprived of the beneficial use of the property and the government obtains the benefits flowing from that deprivation (*e.g.*, public access, habitat, or open space in its natural state).<sup>3</sup>

Indeed, the “rough proportionality” standard set forth in *Dolan* can be viewed as merely an elaboration of the basic *Armstrong* principle of balancing the burdens so that one property owner is not required to bear a disproportionate share of the needs of the community. By limiting restrictions

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<sup>3</sup> Conversely, there are substantial reasons why the “rough proportionality” test should apply to land use restrictions. Consider, for example, the familiar case of a proposed development which raises the prospect of imposing certain burdens on public facilities, such as increased traffic, a need for larger public school capacity, or other like additional pressures on public infrastructure, which burdens could be mitigated by an appropriately commensurate financial contribution or property dedication by the developer. It would defy all logic and deny justice if the relevant regulatory body could avoid the constitutional requirement of *Dolan* that the contribution or dedication required of the developer be “roughly proportional” to the burdens created by simply rejecting the project outright, with no threat of the latter action being deemed a taking. Yet that would be precisely the opportunity available to

on land use to those reasonably addressing the impacts created by the particular development in question, this Court highlights a fundamental premise of fairness and justice—that private property should not be taken by government without just compensation simply because a public need exists—which lies at the heart of the Fifth Amendment.

## II. THE *AD HOC* FACTUAL INQUIRY REQUIRED TO DETERMINE TAKING LIABILITY IS PROPERLY SUBMITTED TO THE JURY.

Petitioner’s contention that liability for a regulatory taking of property without just compensation presents an issue of law, to be determined by the court under the highly deferential standard of review, has been repeatedly rejected by this Court in cases such as *Agins*, 447 U.S. 225 (1980), *Nollan*, 483 U.S. 825 (1987), *Lucas*, 505 U.S. 1003 (1992), and reiterated by this Court just four years ago in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Petitioner fails to recognize that the rule in cases involving broad challenges to an entire ordinance (“facial challenges”) is distinct from the rule applicable in cases asserting that the concrete application of that ordinance results in an unconstitutional taking of private property without just compensation (“as applied

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the regulatory body if, as petitioner and *amici* assert, *Dolan* did not apply to land use restrictions, but only to exactions.

challenges"). Since Petitioner presents no cogent reason why this Court should take the extraordinary step of reversing its holdings in *Agins*, *Nollan*, *Lucas*, and *Dolan*, and because such a standard would have extraordinarily dire consequences for property owners, this invitation to overrule those decisions should be rejected.

**A. The *Euclid* Deferential Standard of Review Applies Only to Broad Challenges to Legislative Enactments, Not to Fact-Based Adjudicative Applications of Ordinances to Particular Uses of Property.**

Where an entire ordinance is challenged on its face, without reference to a specific application of the ordinance to any particular property, this Court has consistently employed a deferential standard of review. In the case which Petitioner claims is controlling here, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), for example, this Court upheld a town's comprehensive zoning ordinance against a facial challenge that it was "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid*, 272 U.S. at 395. In so doing the *Euclid* Court was careful to explain the context of its holding:

[W]here the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in

process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality.

*Euclid*, 272 U.S. at 395. See also, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987)

(requirement that fifty percent of subterranean coal remain in place to prevent subsidence not a taking as a matter of law); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)(wetland regulations not a taking as a matter of law); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (regulation of rock quarries not a taking as a matter of law).

The *Euclid* Court distinguished the case before it from a possible future challenge to the specific application of the ordinance to a particular property:

It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the



appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable.

*Euclid*, 272 U.S. at 395.

The difference between the “facial” and “as applied” standards for analyzing constitutional challenges to land use regulations is illustrated by comparing pairs of cases brought under the same statutes. For example, in *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264 (1981), this Court upheld the Surface Mining Control and Reclamation Act against a facial taking challenge, while in *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 952 (1991), the United States Court of Appeals for the Federal Circuit upheld a money judgment for the taking of particular coal deposits under the same statute. Likewise, in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), this Court upheld the wetland regulations of the Clean Water Act against a facial taking challenge, while in *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. 161 (1990) and *Loveladies Harbor v. United States*, 28 F.3d 1171 (1994), the United States Court of Federal Claims imposed liability for an unconstitutional taking under the wetland regulations, following the kind of *ad hoc* factual analysis required in an

“as applied” taking case. As the *Euclid* Court suggested, even though an ordinance or statute may be upheld under the deferential standard, this does not mean that the same deferential standard should be applied when the regulation “comes to be concretely applied to particular premises,”

*Euclid*, 272 U.S. at 395.<sup>4</sup>

**B. The *Dolan* Standard of Heightened Scrutiny Based on an *Ad Hoc* Factual Inquiry Should Not be Replaced with the Deferential Standard Reserved for Facial Challenges.**

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<sup>4</sup> Indeed, state courts have not felt themselves bound by the “deferential standard of review,” even in cases asserting facial challenges to ordinances which fail to substantially advance a governmental purpose. In *Seawall Assoc.’s v. City of New York*, 74 N.Y.2d 92 (N.Y. 1989), New York struck down a ban on the conversion of single room occupancy (SRO) units, intended to preserve availability of housing for the homeless, on the ground that experience demonstrated that the ban was ineffective. “The heavy exactions imposed by Local Law No. 9 must ‘substantially advance’ its putative purpose of relieving homelessness. No such showing of this required ‘close nexus’ has been made. Rather, the nexus between the obligations placed on SRO property owners and the alleviation of the highly complex social problem of homelessness is indirect at best and conjectural. Such a tenuous connection between means and ends cannot justify singling out this group of property owners to bear the costs required by the law toward the cure of the homeless problem.” *Seawall*, 74 N.Y.2d at 112. See also *Richardson v. City and County of Honolulu*, 759 F. Supp. 1477 (D. Haw. 1991) (rent control ordinance, invalidated because it actually benefited sublessors, not renters); *Manocherian v. Lennox Hill Hosp.* 84 N.Y.2d 385, 394 (1994) (“The preservation of this Manhattan Upper East Side housing enclave for this privileged entity’s benefit, albeit one engaged in a laudable and necessary eleemosynary health service function, cannot masquerade as general welfare legislation.”); *Erlich v. City of Culver City*, 12 Cal. 4th 854 (1996) (monetary exaction as a condition of building approval is a taking).

In contrast to the broad, general challenges to entire statutes or ordinances, in cases such as *Euclid* and *Goldblatt*, this Court has “frequently observed that whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely ‘upon the particular circumstances [in that] case.’” *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)(alterations in original)(quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958)). Justice Scalia, writing for the Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), followed the paradigm for takings analysis set forth by Justice Brennan in *Penn Central*: “In 70-odd years of succeeding ‘regulatory takings’ jurisprudence, we have generally eschewed any ‘set formula’ for determining how far is too far [for a regulation to go before it will be recognized as a taking], preferring to ‘engage in ...essentially ad hoc, factual inquiries.’” *Lucas*, 505 U.S. at 1015 (quoting *Penn Central*, 438 U.S. at 124). See also, *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *on remand*, 21 Cl. Ct. 161 (1990), *vacated*, and *remanded*, 18 F.3d 1560, 1564 (Fed. Cir. 1994)(“One formula that has emerged and has been repeated in several cases requires that the court balance several pragmatic considerations in making its regulatory takings

determination. These considerations include: the economic impact of the regulation on the claimant, the extent to which the regulation interferes with investment-backed expectations, and the character of the Government action.”).

In this case, Petitioner contends for nothing less than the abandonment of the *ad hoc* factual inquiry in favor of the deferential standard for facial challenges applied in *Euclid*, 272 U.S. 365, 386-87 (1926). To do this, the Court would be required to overrule every taking decision since *Penn Central*, *supra*, substituting instead a standard for “as applied” challenges to the specific application of regulations to particular property that even the *Euclid* court itself expressly declined to adopt. Under this standard, cases such as the present one would present no issues of fact to be submitted to the jury but only the bare issue of law whether the denial was arbitrary. Conflicting evidence would be ignored, and the Court would be presented only with the facial question in each instance of whether a city could deny development on police power grounds, without reference to the particular facts of the case. Under such a standard, the Court would be left with very little discretion to rule other than in favor of the city in every case. To adopt the standard that petitioner seeks would thus amount to denying property owners the right to essentially *any* meaningful review of local land use decisions at all, and give regulators unbridled



discretion to limit or to eviscerate completely the rights of property owners to use their property in economically productive ways.

Petitioner's argument here was directly rejected by the majority in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), finding voice in the dissent of Justice Brennan:

Contrary to Justice Brennan's claim, our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, not that "the State 'could rationally have decided' that the measure adopted might achieve the State's objective."<sup>5</sup>

*Nollan*, 483 U.S. at 835, n.3 (citations omitted).

Again in *Dolan v. City of Tigard*, the town made the same losing argument that the *Euclid* standard for facial challenges should be used. Distinguishing *Euclid v. Ambler*

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<sup>5</sup> "At the same time, however, the majority declined to adopt the deferential rational basis test as the standard against which the imposition of the condition was to be tested; instead the opinion concluded that the easement could only be required if it would 'substantially advance' a legitimate governmental interest." Earl M. Maltz, *The Prospects for a*

*Realty Co.*, 272 U.S. 365 (1926), as well as *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (which Petitioner here also cites), the *Dolan* Court stated: "[T]hey involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition Petitioner's application for a building permit on an individual parcel." *Dolan*, 512 U.S. at 385.

To ensure that lower courts would not be confused about the heightened level of judicial scrutiny applicable in individual adjudicative land use cases, the *Dolan* Court even rejected the phrase "reasonable relationship" employed by most state courts "because the term . . . seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Dolan*, 512 U.S. at 391. Responding to Justice Stevens' dissent from the use of heightened scrutiny, the majority admitted that:

He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here, by contrast, the city made an adjudicative decision to condition petitioner's

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*Revival of Conservative Activism in Constitutional Jurisprudence*, 24 Ga. L. Rev. 629, 664-65 (1990).

application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.<sup>6</sup>

*Dolan*, 512 U.S. at 391 (citations omitted).

Moreover, Petitioner's cry that the *Nollan/Dolan* standard will result in the federal courts becoming substitute city councils in zoning matters is simply unsupported. First, in the eleven years since this Court's decision in *Nollan* established that the city carries the burden of proving that the restriction substantially advances a legitimate government purpose, no such excessive federal court involvement has resulted. Second, one good reason for limited federal court involvement in local land use matters is the stringent ripeness requirement under *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), requiring multiple development and permit applications to ensure concreteness, and further requiring in most cases that the landowner pursue his state court inverse condemnation remedy before filing in federal court. See, e.g., *Reahard v. Lee County*, 30 F.3d 1412 (11th Cir. 1994); *Bensch v. Metro. Dade County*, 952 F. Supp 790 (1996). Third, the burden

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<sup>6</sup> "These opinions involve a significantly heightened judicial scrutiny and, as was true in *Lucas*, even the suggestion that legislative findings deserve virtually no presumption of validity." Robert J. Hopperton, *The Presumption of Validity in American Land-Use Law: A Substitute for Analysis, A Source of Significant Confusion*, 23 B.C. Envtl. Aff. L. Rev. 301, 391 (1996).

imposed on the landowner of proving that the restriction denies him all economically viable use or fails to advance substantially a legitimate governmental purpose is significant. The plain fact remains that, in the vast majority of cases, the city's land use decision is upheld against federal court challenge under the *Nollan/Dolan* standard.<sup>7</sup>

Finally, although Petitioner claims some special status for land use regulation under the Constitution (Pet. Br. 20), no reasons in the Constitution or case law support this bold assertion. The plain fact is that land use regulation, like other municipal actions, is exercised subject to the limitations imposed by the Bill of Rights—including the Just Compensation Clause. Where application of a land use ordinance violates constitutional protections, it will be struck down—whether the violation found is of the right to free assembly (*Moore v. City of East Cleveland*, 431 U.S. 494 (1977)), the right to equal protection (*Arlington Heights v.*

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<sup>7</sup> "The lower federal courts are overwhelmingly predisposed to dismiss federal land use cases on jurisdictional grounds, such as abstention and ripeness. In the context of H.R. 1534, my law firm prepared a survey showing that over 80% of the takings cases originating in the U.S. district courts between 1990-97, were dismissed before the merits were ever reached. For those property owners who could afford an appeal, the survey showed that more than half of the takings claims were still dismissed. Of those appellate cases in the survey that were found ripe, 60% were remanded for more litigation on the merits." *Citizens Access to Justice Act of 1997: Hearings Before the Judiciary Committee of the United States Senate*, 106th Cong. (Oct. 7, 1997)(testimony of Prof. John



*Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977)), or the right to just compensation. As Justice Holmes pointed out more than seventy-five years ago, "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

### CONCLUSION

For all of these reasons, *amici curiae* urges this Court to affirm the decision below.

Respectfully submitted,

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July 31, 1998

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J. Delaney)(referring to a survey of takings decisions between 1990-97 completed by Linowes and Blocher LLP in Silver Spring, MD).

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Supreme Court, U. S.

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No. 97-1235

In The  
**Supreme Court of the United States**

October Term, 1997

CITY OF MONTEREY,

*Petitioner,*

v.

DEL MONTE DUNES AT MONTEREY, LTD., and  
MONTEREY-DEL MONTE DUNES CORPORATION,

*Respondents.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AS  
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## INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. Central to the mission of the Institute for Justice is strengthening the ability of individuals to control and transfer property and demonstrating that property rights are inextricably connected to other civil rights.

The Institute's brief is co-authored with Professor Richard Epstein of the University of Chicago School of Law, one of the nation's leading authorities on property law. The Institute also filed an *amicus curiae* brief in *Dolan v. City of Tigard*, among other important takings cases before this Court. The Institute's brief focuses on the proper standard of review when government regulations fully or partially restrict the rights of property owners.

The Institute has obtained the consent of the parties to the filing of this brief, and letters of consent have been filed with the clerk.<sup>1</sup>

## STATEMENT OF FACTS

This lawsuit reaches the Supreme Court after a protracted dispute between the Respondent Del Monte Dunes and the Petitioner City of Monterey ("the City") over the development of a 37.6-acre plot of oceanfront property located adjacent to a multi-family development, a railroad right-of-way, and a state beach park.<sup>2</sup>

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<sup>1</sup> Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

<sup>2</sup> The full statement of facts is drawn both from the decision below, *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), [hereinafter *Del Monte II*] and from the fuller description of the facts found in the earlier Ninth Circuit decision holding that respondent's



The subject parcel had once been used as a petroleum tank farm, and seven tank pads and other equipment had remained on the site. In 1981, Respondent's predecessor in title, Ponderosa Homes, sought the City's permission to build a 344-unit residential development on the site. As part of its application, Ponderosa had to submit for City approval a tentative map outlining in detail its planned-unit-development. *See* Cal. Gov't Code, §§ 66410 to 66499.58 (Deering 1997).

Ponderosa's initial 344-unit proposal "was within the residential density allowed on the site by the existing zoning and general plan designations." *Del Monte I*, 920 F.2d at 1502. Nonetheless the City's planning staff then asked for an environmental impact statement, duly submitted in January 1982. The planning commission then rejected Respondent's permit request, but invited submission of a plan for a project with 264 units. That proposal was in turn rejected in December 1983, when the commission suggested a project with 224 units. Respondent submitted a proposal to that effect in early 1984, which was rejected first by the commission and then by the City Council in March, 1984. The Council then instructed the planning commission to consider a 190-residential-unit development. In July 1984, the planning commission denied Respondent's site plan for 190 units, but its decision was overruled by the City Council in September 1984. The Council did not grant final permission to build but did give Ponderosa an eighteen-month conditional use permit for the proposed site development. One of the fifteen required conditions demanded assurance of habitat preservation for the Smith's Blue Butterfly. This assurance had to meet the approval of the California Department of Fish and Game (DFG) and the United States Fish and Wildlife Service (USFWS). Other conditions required the approval of the Architectural Review Committee of the actual plans; still

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constitutional challenge was ripe for adjudication. *See Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990), [hereinafter *Del Monte I*].

others pertained to access, fencing, grading, underground utilities, provision of moderate income housing, and sound-proofing between units. *See Del Monte I*, 920 F.2d at 1503. In late 1984 Ponderosa sold its interest to the Respondent, Del Monte Dunes.

By August 1985, the professional planning staff had recommended approval of the project, noting that "the proposed subdivision [was] not likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat." *Id.* at 1504. But the planning commission turned down the proposal in January, 1986, and in June 1986, the City Council affirmed the denial of the planning commission, noting that the site was "not physically suitable for the type and density of the development proposed, in that sand relocation and grading necessary for construction of the project results in significant environmental impacts that are not mitigable nor adequately addressed given the current size of the project." *Id.* at 1504. The City Council also found that there was inadequate access to the project and that an inadequate habitat had been supplied for the Smith's Blue Butterfly. *See id.*

Thereafter the landowners brought suit against the City in Federal Court for inverse condemnation. The City defended on the ground that the action was not ripe, but in 1990, the Ninth Circuit ruled for the landowner, and remanded the case for trial. *See Del Monte I*, 920 F.2d 1496. In September 1994, the City again approved Del Monte's proposed 190-unit development, conditional on its ability to provide adequate mitigation for adverse environmental impacts. Negotiations dragged on for another eighteen months between Del Monte, the City, the USFWS, the California DFG, and other interested experts and members of the public. Before the planning commission, Del Monte introduced expert testimony to show that it had met the appropriate environmental concerns; that conclusion was disputed by USFWS and the California DFG. The building permit was again rejected. Thereafter, Del Monte again sued in District Court, and during the pendency of the case sold its land to the state of California for \$4.5

million, or \$800,000 more than its purchase price. That decision left unaffected Del Monte's suit against the City of Monterey. When that case was tried, the jury awarded Del Monte \$1,450,000, and that decision was affirmed again by the Ninth Circuit in September, 1996, fifteen years after the original application was filed. In its decision, the Ninth Circuit noted that the jury passed on *both* relevant questions: was there a legitimate public reason that justified the restrictions in question, and did the restrictions in question deprive the landowner of all viable economic use. The Court then examined *both* these claims and found that each was supported by sufficient evidence. See *Del Monte II*, 95 F.3d at 1429-32 (legitimate justification) and *id.* at 95 F.3d at 1432-34 (economic use). In April 1998 a writ for certiorari was granted.

### SUMMARY OF ARGUMENT

This inverse condemnation case raises both procedural and substantive issues.

Procedurally, the District Court allowed the jury to decide (1) whether the City had legitimate public reasons to restrict Del Monte's use of its own property, and (2) whether those restrictions had deprived it of all economic value. That standard makes sense under Section 1983, which distinguishes between actions at law and suits in equity. An action for damages for what would otherwise be an unlawful taking more closely resembles a common law suit for trespass or conversion than it does a suit in equity for specific performance or an injunction. Absent any intention by Congress to displace the ordinary division of labor between court and jury, such as that governing federal condemnation actions under Fed. R. Civ. P. 71A(h), the decision of the District Court, as affirmed by the Ninth Circuit, was correct.

Wholly apart from its soundness, the critical issue in this case is the standard of review that is brought to the takings claim. The Ninth Circuit carefully reviewed both parts of the takings issue. It first held that the jury had ample reason to find that the City did not meet the "rough proportionality" standard of *Dolan v. City of Tigard*, 512 U.S. 374 (1994) in

advancing its public justifications for the restrictions that it imposed. It also held that the evidence supported the jury's determination that the regulations and conditions deprived Del Monte of all economically viable use of the property.

The judgment below is easily defensible when both these facts are found *in conjunction*. The total wipeout of all economic use has been held by this Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) to be tantamount to a physical taking. Just as with physical takings, the City cannot expect the deference of the rational basis test to evaluate the reasons for its actions. Rather, it must meet the higher level of scrutiny enunciated in *Dolan's* rough proportionality test. The size of the wipeout inflicted and the danger of abusive, factional behavior within local government poses too great a risk for government decisions that work a massive deprivation of constitutional rights.

The rough proportionality standard in *Dolan* should apply even if the City's restriction had worked only a partial restriction of land use. As articulated in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the takings clause contains a specific substantive protection for private property that cannot be overridden on a deferential rational basis standard, such as that applicable to substantive due process or equal protection claims. With partial restrictions, as with total wipeouts, the dangers of faction, abuse and delay militate against a deferential rational basis test that allows too much abuse for too little sensible public gain. Local and state governments often oppose development for reasons that are parochial, anticompetitive and isolationist. Democratic measures of self-correction often fail because bodies frequently give short shrift to the legitimate expectations of developers and their potential customers who do not live and vote within the state or its political subdivision.

This pattern of abuse and delay is evident in this lawsuit, which has bounced back and forth through the courts for nearly eighteen years. The rough proportionality standard only requires courts to review public restrictions of private



development under the same type of standards that they have long used in private disputes. In the short term, the rough proportionality standard might increase the fraction of land use planning decisions subject to judicial challenge. But in the long run it should help reduce the frequency of litigation by making state and local planning commissions fearful of putting pointless obstacles in the path of ordinary development that by no stretch of the imagination constitute a common law nuisance or an unreasonable burden on public facilities.

### ARGUMENT

#### I. Section 1983 Entitles Aggrieved Landowners to A Jury Trial on the Basic Elements of Liability in a Regulatory Takings Claim.

##### A. The Basic Structure of Section 1983 Contemplates Jury Trials for Money Damages in State Regulatory Takings Cases.

The first question presented in this case is whether a plaintiff who brings an action under 42 U.S.C. § 1983 is entitled to have the basic issues of liability determined by a jury rather than by a court. Regulatory takings disputes usually raise two related questions. First, has the landowner been denied all economically viable use of the property? If that question is answered in the affirmative, then the inquiry shifts to whether the rejection of the landowner's development application has substantially advanced a legitimate public purpose. *See Del Monte II*, 95 F.3d at 1426. The Ninth Circuit held that both these issues raised mixed questions of fact and law which fell into the province of the jury, subject to review by the court to correct against manifest error. The division of fact-finding power between court and jury in regulatory takings cases follows the conventional pattern that has served well in countless other contexts, ranging from ordinary tort decisions to statutory causes of action under the anti-discrimination laws. *See, e.g., Lorillard v. Pons*, 434 U.S. 575 (1978) (jury trial in age discrimination actions).

The advantages of this customary division of responsibility are well understood and widely accepted. Using juries allows members of the community to bring their own sense of fairness to matters that turn heavily on the reasonableness of government action, which is so central to this case. *See Del Monte II*, 95 F.3d at 1430. The judicial override offers a check against runaway juries moved by passion and prejudice. The court first sets the applicable legal standard; then the jury makes the initial factual determination; finally, trial and appellate courts set aside verdicts when juries reach manifestly indefensible decisions. Regulatory takings cases offer no special reason to displace this time-honored division of power as a matter of policy. Nor does anything in this Court's decision in *United States v. Reynolds*, 397 U.S. 14 (1970) require the contrary. That decision only dealt with the division of responsibility between judge and jury under rule 71A(h) of the *Federal Rules of Civil Procedure*, which governs federal condemnations in federal court, but which has no impact on inverse condemnation proceedings brought against state governments in federal court. *Reynolds*, 397 U.S. at 20.

##### B. This Court Should Decide the Important Substantive Question of Constitutional Law even if it Rules that the Trial Judge Should Resolve all Questions of Liability in Regulatory Takings Disputes.

The central issue in this case is not whether juries should be excluded from any role in determining government liability in land use cases. Rather, it concerns the substantive standards by which these government decisions will be judged. The Court will surely have to face this critical issue sooner or later, for even if the Ninth Circuit erred on this procedural point, the substantive issue remains central to the case on remand. Rather than allow that trial to take place in ignorance of the applicable standard of review, it is better to resolve the issue now on the strength of a detailed factual record that permits full consideration of the relevant factors. The implications of this issue are so profound for the health

of the nation as a whole that any delay in passing on the question will unnecessarily allow uncertainty to fester in countless other land use and permit disputes that raise similar questions. A clear statement on the matter is required.

## II. The "Rough Proportionality" Standard of *Dolan* Clearly Applies to Government Regulations that Deprive Landowners of All Economically Viable Use of their Property.

### A. The Questions Presented Implicitly Address Situations in which State Regulations Have Deprived Landowners of All Economically Viable Use of Their Property.

The second and third questions presented in the City's petition for certiorari place in sharp relief the standard of review for government action in inverse condemnation cases. Question Two asks "whether liability for a regulatory taking can be based on a standard that allows a jury or court to reweigh the evidence concerning the reasonableness of a public agency's land use decision." The presumed answer to this question is "no," which in effect allows government agencies a free pass whenever they make individualized decisions that restrict the use of private lands. Question Three asks "whether the reasonable proportionality standard established by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in the context of property exactions can be properly applied to an inverse condemnation claim based upon a regulatory denial."

As formulated, the questions presented elide a critical point about the position of this case on appeal. The judgment below must be sustained either (1) narrowly, that the *Dolan* standard applies in all cases where the state seeks to justify land use restrictions that totally destroy all economically viable use *or*, (2) if this Court decides, broadly, that the *Dolan* standard applies to all partial land use restrictions. Amicus Curiae believes that the narrow proposition is already well established as a matter of law, and that the broader proposition is sound as a matter of constitutional principle.

Accordingly, this brief first addresses the more limited question of the application of *Dolan* to cases of total wipeouts, and then the broader issue of whether the *Dolan* standard applies to State justifications for partial land use restrictions.

In dealing with this case, the City's proposed answer is that the state may be asked to justify its actions when it conditions the issuing of a building permit on the surrender of a possessory interest in property (a fee interest, or an easement) but not for any "mere" restrictions on land use, even those that deprive the landowner of all economically viable use of the land. Thus the Petitioner and the various Amici claim that *Dolan's* rough proportionality standard is limited to cases of permanent physical occupation of once private lands. In support of that position they point to the conclusion found in such decisions as *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995): "Based on a close reading of *Nollan* and *Dolan*, we conclude that those cases (and the tests outlined therein) are limited to the context of development exactions where there is a physical taking *or its equivalent*." *Id.* at 1578. (emphasis added).

Ironically the last clause of this sentence in *Clajon* clearly supports the Respondent's judgment below: the only "equivalent" to a physical taking is an economic regulation that deprives land of all beneficial economic use, which is precisely the situation present in this case. Given the factual posture of this case, the City's position embraces an indefensible anomaly. Generally speaking, the complete loss of all economic use is treated like the physical dispossession of private property because it is its functional equivalent. See *San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621 (1981) (Brennan, J. dissenting); see also, Lawrence Tribe, *American Constitutional Law* § 9-3 (2d ed. 1988) ("Thus a taking occurs . . . when government controls a person's use of property so tightly that, although some uses remain to the owner, the property's value had been virtually destroyed"). If the rough proportionality standard holds for an exaction that leaves a landowner with many beneficial uses of property, then it must surely apply to the *greater* loss of rights that flow from the complete loss of all viable economic use.



Accordingly, the correct analysis of this case requires an understanding of the two key elements of a regulatory takings case: (1) did the government action deprive the landowner of all viable economic use, and (2) was there a legitimate public purpose that supported the state's action.

**B. The State Deprives An Owner of Vacant Land All Beneficial Economic Use When the Totality of its Permit Conditions and Restrictions Render Economically Unviable Even the Ideal Development Program.**

The issue of whether government action has deprived a landowner of all viable economic use arises in two separate contexts. The first of these involves cases where the landowner is *already* making productive use of his property, but wishes to make more intensive use of the land in question. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the owners of the Grand Central Terminal sought to construct a major new structure in its upper air space, which was denied under New York's landmark preservation ordinance. This Court refused to award Penn Central compensation in part because Penn Central had not been deprived of all economically viable use of its property. The revenue from the land and building covered its costs and allowed the owner a profit even in its current configuration.

The maintenance of the status quo does not offer the government an escape hatch for land that has *no* current productive use. To require land to remain vacant necessarily strips away its entire economic use and thus rises to the level of a compensable taking. That was the clear import of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), where South Carolina prohibited all new construction on a buildable beachfront lot. But constitutional obligation to compensate is not limited only to cases that explicitly prohibit any development of the land. A formal permission to build, coupled with a set of restrictions that in combination make building unprofitable, has the same practical effect as the

absolute prohibition. Accordingly, it has been treated in the same fashion.

Thus, in *Bowles v. United States*, 31 Fed. Cl. 37 (1994), the Army Corps of Engineers denied the landowner a permit to fill his land for a septic tank, and required him (alone among his neighbors) to "build a house on stilts and install a holding tank sewer system without filling Lot 29 [his building plot]." *Id.* at 44. The sole use of the land was for a single family residence, and the Court ordered compensation by crediting the landowner's evidence and by disregarding the contrary evidence of the government. The Court found that meeting the Corps's requirements of an above-ground sewage system gave the lot a negative value. *Id.* at 44. In contrast, the cases that have refused to find a total deprivation of economic use have typically involved situations where the regulation itself explicitly preserved some profitable land use to its owner. Thus, the landowner was not deprived of all economic value in *Outdoor Systems v. City of Tucson*, 997 F.2d 604 (9th Cir. 1993), when the City's sign ordinance conditioned the issuance of a valuable building permit on the dismantling of any billboard on the land. Nor was a landowner deprived of all economic use when prohibited from hunting "surplus game" on its own property, although allowed to continue with all of its other previously profitable activities. See *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1575 (10th Cir. 1995). In all these cases the residual uses allowed the owner to market the land at a positive market value. Not so with the restrictions imposed on Del Monte: once the conditions were imposed, any further development of its land would only add to its financial losses.

**C. The City of Monterey Has Not Shown that the Total Deprivation of Viable Economic Use is Necessary to Prevent any Nuisance-Like Harms to Others.**

The City of Monterey does not necessarily lose a regulatory taking case simply because a landowner has been deprived of all economically viable use. But within that

confined context, it no longer suffices for the City to show that the restrictions in question advance some broad objectives of land use planning such as the preservation of open spaces, *see Agins v. City of Tiburon*, 447 U.S. 255 (1980), or growth control, *see Schenck v. City of Hudson*, 114 F.3d 590 (6th Cir. 1997). Rather, the City is put to a higher test in light of the greater devastation that its regulations have wreaked. Now it must show that this set of provisions was justified in order to prevent nuisance-like harms to others. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Notwithstanding their formal equivalence, the examination of the relevant justifications for government action does, however, raise distinctive issues when the landowner's takings claim rests on a complete loss of economic use as opposed to the permanent occupation of land. Only in extraordinary cases could a state justify the complete occupation as necessary to prevent the occurrence of a common law nuisance. Except in extraordinary cases, some lesser restriction on land use could achieve that same end. But that less-restrictive alternative is not obviously available when government land use regulations force a landowner to suffer a total loss of economic use: in principle, these restrictions could be the least restrictive means of preventing nuisance-like harm to strangers, in which case they do not run afoul of the takings clause.

**D. Only Anti-Nuisance Justifications Suffice in Cases Where Regulation Strips a Landowner of All Economically Viable Use.**

*Lucas* itself makes clear the limited types of justification made available to the state when land use regulations work a total taking. Thus this Court held that the state "may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1027. This Court made the point still more explicit when it said:

[a] law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts – by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

*Lucas*, 505 U.S. at 1029.

In light of that standard, this Court remanded the case to the South Carolina Courts to decide whether a total prohibition on new construction on plaintiff's beachfront lots was consistent with the common law of nuisance (which contains the implicit limitations on use inherent in fee simple ownership). The South Carolina Court held it did not. *See Lucas v. South Carolina Coastal Council*, 309 S.C. 424, 424 S.E. 2d 484 (1992).

Lower court decisions have then held that the state bears the burden of proof on this critical question of nuisance prevention:

When a total regulatory taking occurs the government can resist compensation only if the nature of the owner's estate shows that the proscribed use was not part of the owner's property right to begin with. . . . In the case of a fee simple estate in land *the government has the burden of proof* to demonstrate that the prohibited use of the property constitutes a nuisance under state common-law doctrine. It cannot hide behind conclusory legislative findings that simply characterize land use restrictions as harm-preventing.

*Bowles v. United States*, 31 Fed. Cl. 37, 45 (1994). (emphasis added).

*Bowles* then applied this test by holding that "building a house" is not a common law nuisance. *Id.* at 49. The same logic applies in this case. There is simply no credible argument that the construction of a housing complex on a dune near the beachfront is a nuisance. That was the conclusion in



*Lucas* and it has to be the conclusion here. The state may want to preserve land in its natural state, whether for tourism or for needed habitat, but if so the condemnation option always remains open to it. The power of eminent domain confers on the state the extraordinary power to take private property without the consent of its owner. But it authorizes only condemnation, not public theft. Ordinary individuals who obtain consent must pay for what they take. All the more reason why the state must pay for what it takes *without consent*. That extraordinary government power to take without landowner's consent cannot under our Constitution be transmuted into the tyrannical power to take without compensation. Confiscation is not allowed when the government permanently occupies land. It should not be allowed here with its functional equivalent – the stripping away of all economic use of the property. The short, simple truth is that the state's own preferred justifications for its actions fall short of what *Lucas* requires of it. For these reasons alone the decision of the Ninth Circuit should be affirmed.

**E. The Dolan Rough Proportionality Standard Governs State Justifications for Total Land Use Wipeouts.**

At present this Court has adopted a strict scrutiny standard whenever the government takes permanent physical possession of private property. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). That rule holds whether the government occupies the land or authorizes private parties to occupy it, as was the situation in *Loretto* when the cable company's box was placed on the roof of the landowner's apartment building. As noted earlier, *Lucas* expressly adopted the language of strict scrutiny when it examined the state's justification for imposing land use restrictions.

The applicable standard of review in *Lucas* stands in sharp opposition to that used with partial restrictions on land use, i.e. those that do not deprive the landowner of all economically viable use of his property. See *Dolan*, 512 U.S. at

385, n.6. Historically, the rational basis standard of review dominated takings cases under the jurisprudence of this Court. That standard (although not those exact words) governed this Court's initial foray into zoning law in *City of Euclid v. Ambler*, 272 U.S. 365 (1926). It was more consciously applied in *Goldblatt v. City of Hempstead*, 369 U.S. 590 (1962). *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), marked a self-conscious retreat from the earlier trend and the acceptance of a higher standard of review.

*Nollan* addressed the situation in which the state was willing to issue a building permit if the landowner was prepared to submit to the exaction of a lateral easement across its land. This Court rejected the state's effort to bundle the easement with the building permit when the easement was unrelated to the state's asserted interest in preserving a viewing easement from the public highway over *Nollan's* land to the Pacific Ocean. In so doing, *Nollan* explicitly rejected any assimilation of takings cases to the lower rational basis standard, which has long been the norm in equal protection or due process challenges to state regulation of ordinary economic liberties (chiefly to buy and sell goods and services at unregulated prices or wages). See *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955). Thus *Nollan* states (in language that supports both Respondent's broad and narrow claims) that

there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical.

483 U.S. at 836, n.3.

Thereafter the Court limited *Goldblatt* by noting that it does "appear to assume that the inquiries are the same, but

that assumption is inconsistent with formulations of our later cases." *Id.*

The exact level of the increased scrutiny required under the takings clause was not fully settled in *Nollan* because of the utter lack of any nexus between the lateral beachfront easement and the viewing easement. It fell to *Dolan* to test the closeness of the relationship between the exactions demanded and the state justifications for their use. In *Dolan*, the plaintiff wished to double the size of her plumbing supply store, but was told by the City that she could obtain the necessary permits only by deeding over portions of her land for use as a flood plain and a pedestrian/bicycle pathway. This Court recognized that these restrictions in principle could be related to legitimate public ends, but steadfastly refused to defer to the City's judgment on the closeness of that connection. In remanding the case, this Court held that the state must demonstrate a "rough proportionality" that linked the exactions imposed to the ends they served.

In articulating this rough proportionality standard, this Court reviewed the decision standards of state courts to decide whether the findings made in *Dolan* "are constitutionally sufficient to justify the conditions imposed by the city on Petitioner's building permit." *Dolan*, 512 U.S. at 389. More specifically, the Court first rejected a rational basis standard of review under which "very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice." *Id.* at 389. At the opposite extreme, this Court also rejected a "very exacting correspondence, described as the 'specific and uniquely attributable' test." "We do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved." *Id.* at 389-90.

This Court then opted for the rule adopted in the majority of states that "have taken an intermediate position, requiring the municipality to show a 'reasonable relationship' between the required dedication and the impact of the proposed development." *Id.* at 390. Nonetheless this Court was uncomfortable with this verbal formulation.

We think the 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term 'reasonable relationship' seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

*Id.* at 391.

At this juncture *Euclid*, with its rational basis approach, was explicitly distinguished on the ground that it involved "generally applicable zoning regulations," in contrast to the city's "adjudicative decision to condition Petitioner's application for a building permit on an individual parcel," where "the burden properly rests on the city." *Id.* at 391, note 8. *See also id.* at 385 (contrasting the "essentially legislative determinations classifying entire areas of the city," with the "adjudicative decision" involved in passing on *Dolan*'s application). The clear import of these passages is that rough proportionality is tantamount to intermediate scrutiny in the choice of means to reach the set of antinuisance objectives.

The rejection of rational basis review applies with undiminished force in the current case. No one doubts that Del Monte had complied with all general zoning ordinances in its initial permit application. All the objections to its proposed plan of construction rested alleged defects in that program that depended on conditions that apply to every coastal dune in the United States. All dunes contain high and



low points. How easy it is to allege that building on the high ground blocks views over the land, while building on the low portions could have some impact on drainage; or that each plot of undeveloped land could in principle serve as habitat for some species, endangered or otherwise, of interest to the state.

We are far from suggesting that the state is incapable of acting when it is prepared to compensate for the losses that it wishes to impose on the landowner and his potential purchasers. In this case, however, these concerns have been invoked to delay for years development on this parcel and this parcel only. Yet the City's reasons for denying a building permit contained only cookbook responses that could have been drafted in complete ignorance of the evidence gathered in this case. Indeed, if anything, the "findings" here were less informative than those rejected as insufficient in *Dolan*, for there at least flood plain and traffic control counted as unquestionable ends of the state's police power. In contrast, the stylized responses offered by the City of Monterey did not reveal any discernible harm to public lands or waters; nor did they show any harm to the property of any neighbors; nor did they show any excessive demands on infrastructure that have been the concern in recent federal appellate opinions; *see, e.g., Schenck v. City of Hudson*, 114 F.3d 590 (6th Cir. 1997), or state court opinions, *see Sprenger, Grubb & Associates, Inc. v. City of Hailey*, 127 Idaho 576, 903 P.2d 741 (1995). At most they demonstrated an awareness of the inevitable environmental change that accompanies any development anywhere. If the rough proportionality standard carries over to this case, then the decision of the Ninth Circuit must stand.

### III. Even in Cases of Partial Land Use Restrictions The Rough Proportionality Standard Should be Adopted.

#### A. Rough Proportionality Reconciles the Need to Curb the Sum of Private and Public Abuse.

The broad version of the question presented in this case is whether the rough proportionality standard should be applied to review government justifications for partial land use restrictions. Legal authority on this point is surely divided. This Court's decision in *Nollan* points to the general rejection of a rational basis standard in connection with specific substantive guarantees, such as the takings clause. But the Circuit Court and state court decisions distinguished above, all take the position that the rough proportionality standard of *Dolan* only applies to exaction or dedication cases. Amicus Curiae submits that the higher standard of rough proportionality review is appropriate with regard to the full range of land use restrictions.

The Constitution and Bill of Rights contain a large number of individual guarantees, but they contain no explicit instructions on the standard of scrutiny that should be used. The various government parties attacking the Ninth Circuit decision write as though the only real issue at stake involves preserving the "flexibility" of government to make land use decisions, including those relevant to the preservation of endangered species. *See, e.g.,* Amicus Curiae Brief for the United States, supporting the Petitioner in Part, at 1. In so doing, they act as though the only goal is to preserve the appropriate sphere of action for virtuous and informed government action. Our Constitution takes a different view of government action. On the one hand it obviously authorizes official action at all levels, but it does so with a keen appreciation of the abuses that can subvert its sound operation. Ever since Federalist No. 10 articulated the danger of faction, the theory of constitutionalism poses a more complex inquiry than Petitioner's one-sided account acknowledges. The issue is not merely how to preserve government flexibility for constructive ends. Rather, it is how to preserve government flexibility for constructive ends *without giving the state carte*

blanche to perform destructive actions. Our Constitution thus always performs the balancing act of both authorizing and limiting government action. So the real question is how is that best done?

The problem is best understood by linking the choice of standard to the costs of an erroneous decision under conditions of uncertainty. Any judicial judgment on constitutionality is subject to two types of errors. See generally David C. Baldus & James W. L. Cole, *Statistical Proof of Discrimination* 291-92 (1980). Type I error is to uphold a constitutional challenge to lawful government action that should be allowed. Type II is to permit a government action that should be prohibited. It is impossible to eliminate both types of error simultaneously since they are inversely related. The only way to eliminate the last bit of one type of error is to increase substantially the error rate of the other type. If both forms of error were weighted equally, then the ideal strategy would be simply to reduce the sum of the errors, without regard to their direction – which offers a sensible interpretation of the standard of rough proportionality (or intermediate scrutiny) under *Dolan*. But let one type of error be weighted more heavily than the other, and the balance shifts accordingly. Greater attention should be paid to eliminate those errors that carry with them the more serious negative consequences.

The various standards of constitutional law respond to these different weights of error. A strict scrutiny standard is used when this Court adjudges the errors of commission to be far greater than the errors of omission. The rational basis standard is used when this Court adjudges the errors of omission to be far greater than the errors of commission, leaving intermediate scrutiny to cover those cases where errors are of roughly equal weight. An intelligent program of constitutional adjudication necessarily makes rule-of-thumb estimations of the gravity of error in certain well-established categories. It is not possible at this juncture to analyze how this framework applies to the various freedoms protected by the Bill of Rights, or to the various classifications (race, sex, age, alienage, wealth) that could be challenged under the equal protection clause. But in the takings area, it is clear that

the strict scrutiny standard requires the state to pay compensation when it permanently dispossesses the owner of private land.

The situation is more complex when land use regulation is at stake, for the difficulties with harmful spillovers are no longer so easily dismissed. It is this reason that best explains *Dolan's* rejection of the strict scrutiny standard adopted in some states. See *Pioneer Trust & Savings Bank v. Mount Prospect*, 22 Ill. 2d 375, 380, 176 N.E.2d 799, 802 (1961). The construction of a hard surface covering in one area could lead to dangerous runoff in other areas. The construction of a new shopping center or apartment complex will increase the demands of roads and infrastructure. A strict scrutiny standard could easily be held to frustrate the efforts of the state to make sure that the actions of some individuals do not impose untoward costs on nearby property, public or private. *Dolan* thus treats the risk of private abuse as too great to justify strict scrutiny, at least under *federal* constitutional law – leaving open the possibility that state constitutions might impose higher standards of review on their own legislative and administrative processes.

If private abuse (such as harmful spillovers) were routinely curbed by well designed state regulation, then the error minimization framework could justify the rational basis standard of review. State and local governments could never be faulted for their dubious motivation or their insufficient knowledge. Since the risk of official misconduct is nil, the vast deference required under the rational basis standard would provide the proper theoretical norm. But the question of abuse of state and local power cannot be dismissed cavalierly. Even in those cases that do *not* result in a total deprivation of economic value, a landowner could suffer the loss of seventy-five or eighty percent of land value, amounting in individual cases to millions of dollars of loss. In those situations, it is easy to recognize that vast powers of state and local government operate as a two-edged sword, capable of being turned to parochial as well as public-spirited ends. It was just that concern with arbitrary state and local power that led Madison to trumpet the virtues of the extended republic in



Federalist No. 10. The dangers and vagaries of any system of political logrolling lay at the root of the public choice movement. See generally James Buchanan & Gordon Tullock, *The Calculus of Consent* (1962). And F.A. Hayek has exhaustively demonstrated the dangers and inevitable impossibility of central planning. See, e.g., *The Road to Serfdom* (1944); *The Constitution of Liberty* (1960); *The Fatal Conceit: The Errors of Socialism* (1989). No one can deny that local governments often have superior knowledge of local conditions. But, by the same token, no one can deny that the virtues of community participation and reasoned deliberation often yield to the dangers of political faction and legislative or administrative capture. Here, as in other contexts, the law of diminishing returns sets in. The last bit of private abuse that is ferreted out by public agencies operating under the rational basis test paves the way for substantial amounts of public abuse committed by state and local governments whose activities are, under that test, virtually immunized from constitutional scrutiny.

The risk of government misconduct is serious and endemic, and it reaches partial land use restrictions with the same fury as total wipeouts. It stems from the frequent mismatch between private landholdings and political power. An individual owns a valuable parcel in a given community, but has few, if any, votes to protect him from the restrictions imposed by a determined majority. Worse still is the position of individuals who live outside the local community and own no property within it, for they cannot register their preferences in the political process, for they cannot identify themselves until the project is ready for sale or lease.

This fuller picture of state and local government therefore reveals substantial costs to *both* kinds of error. In the exaction context, a rational basis test outweighs the fears of excessive private misbehavior relative to the equal risks of excessive localism and protectionism. Rough proportionality, with its appeal to intermediate scrutiny, recognizes the approximate parity in the two forms of error. It does not fixate on private misconduct while allowing government abuse to multiply free of judicial review.

This rough proportionality standard does not eliminate all prospect of abuse, but it helps achieve the right legal objective, which is to minimize the expected costs of the two forms of error. In particular, the intermediate scrutiny standard takes into account the obvious point that more state and local land use regulation does not necessarily lead to better state and local land use regulation. It may be relatively easy to eliminate the most obvious forms of error by taking some simple steps, such as imposing restrictions against pollution, discharge, and other common law nuisances. Any effort to insulate all state and local actions from constitutional scrutiny ushers in, however, the endless rounds of official obstruction that mark and mar the record in this case.

Any other result would be unwise because it would erect an unnecessary categorical divide between easements (that allow entry that would otherwise constitute a trespass) and restrictions (that prohibit uses that would otherwise be lawful) that destroy or impair economic viability. But the political forces that lead to local abuse are equally powerful in both these situations. Any legal regime that guarded against exactions while allowing land use restrictions to impose total wipeouts would lead to perverse economic results. The Constitution would prevent local governments from imposing easements that cost \$100 as a condition to exercise development rights worth \$1,000. But the Constitution would stand mute as state and local governments condition development on accepting land use conditions that reduce those same development rights by \$500, if they don't wipe them out altogether.

#### **B. The Need for Judicial Oversight is as Great in Land Use Restriction Cases as it is in Exaction Cases.**

Judicial scrutiny of government behavior in exaction cases ultimately rests on the awareness of the inherent limitations of the political process. The same concerns carry over to state and local land use restrictions that impose substantial economic losses.

First, *Dolan* stressed the great dangers of individualized exactions, as opposed to generalized zoning ordinances. See *Dolan*, 512 U.S. at 385 and 391, n.8, discussed *supra* at 22. This last worry is fully vindicated here since Del Monte had satisfied all general zoning requirements but was tormented for years with an endless array of individualized planning reviews that resulted in a complete rebuff of its ability to build on its own tract of land.

Second, the same constellation of state and local political forces are at work with these ad hoc land use restrictions as with exactions and dedications. Local residents and planning commissions could easily vote against a proposed project that promises large gains for its potential residents because it imposes some small loss or inconvenience on local residents. But a rational basis test will not uncover these abusive restrictions because the state can always show some reason for the action, namely, that it will benefit the majority who voted for it. Only the standard of reasonable proportionality can examine the purported reasons for the decision and expose the parochial interests that led to its passage.

Third, this case shows that it is unwise to assume that the use of a rough proportionality standard heralds a return to the *Lochner* era in which the economic and social decisions of state legislatures were constantly second-guessed by courts. See U.S. Amicus Curiae Brief at 13, n.6, claiming that closer review would turn the federal courts into super-zoning boards. See also *Schenck*, 114 F.3d at 593. But these fears are quite groundless. The question in this case is whether the state can point to some legitimate interest that justifies the restriction in question.

On this score it makes good sense to ask about the legitimacy of the ends and the appropriate nature of the means. On the first point, the concerns with habitat preservation may be honored by condemnation, but they should never be respected as the grounds for a simple declaration that a parcel of land is off-limits for all forms of development. The simple reason is that this purported justification places no limit on state appetites. First, one level of government could insist that portions of the land be set aside for habitat to

"mitigate" the harms from development. But in the next breath, another state or federal agency could find yet another environmental peril that requires still more land to be set aside. And then a third. The combined effect of these attacks is to wipe out all value of land because the landowner cannot by agreement with any single agency obtain the clarity of title needed for ordinary development. The land will be taken little by little, and each government agency will hide behind the actions of the others. The rough proportionality standard blocks these dubious stratagems by looking both at public ends and the public means. So implemented, that standard prevents the endless train of public misconduct that has festered under the rational basis test, without hamstringing public efforts at environmental protection.

The common law baselines in *Lucas* thus work to stabilize relations between the multiple layers of the government and an individual landowner. With the police power ends of the government properly defined, the only factual questions at hand are those already identified in *Lucas*: does a neighbor (or the public as an agent) have reason to enjoin the development. That standard will reduce (for good reason) the levels of government activity, which in turn should lead to a reduction in the level of administrative and judicial action in land use matters. The City simply has no case to impose these restrictions on Del Monte under California's definition of nuisance law. See Cal. Civ. Code § 3479 (West 1998) (Nuisance Defined):

Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary matter, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

A close look at this record shows the evident virtues of this state law standard. The City for over a dozen years used a combination of exactions and restrictions to foil routine



beachfront development, which by no stretch of the imagination constitutes a nuisance at common law. The first wave in its assault was the demand that Del Monte set aside the western third of its land for public beach use and access. That demand simply imitates on a grander scale the lateral easements that the California Coastal Commission claimed in *Nollan* and the bike and pedestrian path claimed in *Dolan*. Next the City imposed on Del Monte a requirement that it take active steps to preserve the buckwheat habitat for the Smith's Blue Butterfly (only one of which was observed on the property in 1984. *See Del Monte II*, 95 F.3d at 1431.) The decision could be treated as a simple land use restriction, yet on the other hand it also looks very much like a special tax for the privilege of real estate construction that should also be caught under the *Dolan* rationale.

Any requirement that certain portions of land be left in its natural state verges on a demand that the property be conveyed to the government for use as a nature preserve. But one great advantage of a unified approach to land use regulation is that courts no longer have to ask the question of whether this government action amounts to a possessory taking when the landowner may exclude all others, but cannot enter or use the land himself, and thus is forced to stand in the same distant relationship to his land as a total stranger. Why should the government reap the benefits of fee ownership without having to go through the usual formalities of taking title to the property? *See Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871).

More generally, exactions segue into land use restrictions on the remaining portions of Del Monte's parcel. As mentioned previously, dunes always have high and low points. So it is an easy maneuver for the state to claim that it is improper to fill in the low, or "bowl" areas on the land because that will create environmental hazards. It is then just as easy to claim that it is also impossible to build on the high portions of the

land because the development might block a view corridor to the ocean, or might be seen from public highways or other public lands. Under the rational basis test advocated by the City, the state can multiply without end the permissible objectives of land use regulation and then choose the broadest possible means to achieve them. Each individual restriction is looked at in isolation even when in combination they wreak devastation on any and all development programs.

#### **IV. State and Local Governments Have Taken Advantage of Judicial Deference to Frustrate The Reasonable Expectations of Property Owners.**

The level of deference demanded by the City and its numerous Amici must fall given the long-track record of government planning abuse that it fosters. One lesson that state and local governments learned after *Lucas* was that a simple outright prohibition on new development could expose them to liability for hefty sums from the land rendered worthless by their decisions. The political dynamics of state and local governments, however, quickly resulted in the erection of partial barriers to either delay or block the development of land. Just that result happened in South Carolina after *Lucas*, when the state's original flat prohibition against all beachfront development was scrapped once it became clear that it was vulnerable to takings challenges. In its place came a far more complex statutory framework with more elaborate special permitting provisions. *See S.C. Code Ann. § 48-39-290(D)* (Law Co-op. 1997). Yet the new procedures contain no limitations that force decisions to be made within some reasonable time after the application has been made. Rather the systems allow local planning commissions to take advantage of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), which holds that judicial review of planning commission action is normally precluded until a final judgment has been entered against the landowner.

Unfortunately, *Williamson* became an open invitation for planning commissions to kill land use development by plying developers with endless opportunities to be heard. Traditionally government was feared for its arbitrary decisions made without hearings and notice to the parties. The new wave of abuse, so clearly evident in this case, features endless inspections, reports, filings and hearings whose sole purpose is coldly calculated to block access to the courts by postponing finality until the will of the landowner is broken. The late Grant Gilmore could well have had planning commissions in mind when he wrote: "The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed." Grant Gilmore, *The Age of Anxiety*, 84 Yale L. J. 1022, 1044 (1975). Procedural Hell also has its unintended ironies. In this very case, the planning commission received five separate proposals for real estate development and then had the temerity to argue (unsuccessfully) in federal court that Del Monte's compensation claim was not yet ripe for adjudication. See *Del Monte Dunes I*, 920 F.2d 1496 (9th Cir. 1990).

Planning commissions have also resorted to endless litigation to subvert this Court's holding in *First English* that compensation must be paid for final decisions that lead to regulatory takings that deprive a landowner of all economically viable use for a limited period of time. *First English* carved out an apparently innocent exception for cases "of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 321 (1987). Yet once again the definition of a "normal delay" has been stretched beyond all recognition by the California Supreme Court, which denied compensation for interim losses when the delay issuing a development permit took place "partly owing to the mistaken assertion of jurisdiction by a government agency." See *Landgate, Inc. v. California Coastal Comm'n*, 17 Cal. 4th 1006, 953 P.2d 1188 (1998). The landowner has to pay for the mistakes of the planning agency, which of course gives that agency painless incentives to make aggressive assertions of

jurisdiction. To date, the instant case has resulted in 17 years of wrangling and confusion. How much better it is for the City to be put to a clear choice: condemn the land or have your planning restrictions subjected to a rough proportionality standard.

No one can claim that rough proportionality to evaluate state justifications for land use restrictions will solve all the problems of real estate development in California or anywhere else. But here is a case where the consistent application of sound constitutional principles should not be deterred by cries of wolf from local governments who claim that the takings clause constrains their prerogatives. That it will indeed do as noted by this Court in *First English*, 482 U.S. at 321. But it will do so for sound constitutional reasons. The decision of the Ninth Circuit sends a much needed message to local governments that their stubborn disrespect for the property rights of local landowners carries with it a price.

## CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be affirmed, and the judgment of \$1,450,000 in favor of Del Monte should be affirmed.

Respectfully submitted,

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OCTOBER TERM, 1997

CITY OF MONTEREY,

*Petitioner,*

*v.*

DEL MONTE DUNES AT MONTEREY, LTD.  
AND  
MONTEREY-DEL MONTE DUNES CORP.,

*Respondents.*

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**BRIEF OF THE  
NATIONAL ASSOCIATION OF HOME BUILDERS  
AND THE BUILDING INDUSTRY  
LEGAL DEFENSE FOUNDATION  
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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## INTEREST OF THE AMICI CURIAE

The *amici* have received the parties' written consent to submit this brief.<sup>1</sup> Letters of consent have been filed with the Clerk of this Court.

The National Association of Home Builders ("NAHB") represents over 190,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The NAHB has appeared before this Court as an *amicus curiae* or as "of counsel" on behalf of the property owner in prior takings cases involving land use regulation. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621 (1981);<sup>2</sup> *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical*

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<sup>1</sup> Pursuant to Rule 37.6 of this Court, *amici* state that their counsel authored this brief and *amici* paid for it. This brief was not written in whole or part by counsel for a party, and no one other than *amici* made a monetary contribution to its preparation.

<sup>2</sup> Justice Brennan's dissent cited approvingly the NAHB brief. 450 U.S. at 643 n.6.



*Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987);<sup>3</sup> *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997).

The Building Industry Legal Defense (“BILD”) Foundation is a not-for-profit corporation organized under the laws of the State of California. The BILD Foundation is a wholly-owned subsidiary of the Building Industry Association of Southern California, whose 1,650 members include a significant number of residential developers and associate businesses accounting for 70% of all annual new home construction in Southern California. The BILD Foundation’s mission is to “[d]efend the legal rights of home and property owners.” It appeared before this Court as an *amicus curiae* in *Suitum v. Tahoe Regional Planning Agency*, *supra*.

The *amici* are here to present constitutional, legal and policy arguments on why the decision of the Court of Appeals squares with this Court’s precedents regarding the application of the Just Compensation, or Takings, Clause to land use regulation that goes “too far.” Property owning citizens, such as those represented

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<sup>3</sup> The Court opinion cited approvingly the NAHB brief. 483 U.S. at 840.

by the *amici*, must have available the right, a meaningful right, to go before judge and jury to seek just compensation for regulatory takings. If the circumstances of this development case are found not to amount to an unconstitutional taking, then members of the *amici* who face similar deliberate abuses of the land use system have little protection, in the real world, under the Constitution’s Bill of Rights.

### SUMMARY OF ARGUMENT

Regarding Question 2 (on “reasonableness”), the City of Monterey would expand the normal deference accorded municipal land use actions to a virtual bar on any meaningful judicial inquiry into those actions where a citizen is *singled out for particularized treatment* and can make out a cognizable claim of a violation of the Fifth Amendment’s Takings Clause. Why? Why should this one constitutional right be treated differently from the others? Why should the defending government, rather than the impartial fact finder, make the final decision on the reasonableness of that government’s actions when a citizen’s constitutional right is at stake in court? Because, as the city candidly contends in its Brief, the Constitution should play a “limited role” in local land use decisions. To the city’s way of thinking, its unilateral assertion of the “reasonableness” of its land use actions would serve as a pretext to defeat almost automatically any claim of an unconstitutional taking. But such an idea is contrary to this Court’s precedents as well as to fundamental fairness. It is already exceedingly difficult, under ripeness doctrines, to get a takings claim

into court and, if to trial, to win such a claim. The argument pressed here by the city and its *amici* would make it well nigh impossible.

Regarding Question 3 (on *Dolan*), the Court of Appeals properly applied this Court's regulatory taking tests to the facts before it. The lower court did not misapply the *Dolan* "rough proportionality" standard because, as it held, the city never got past the threshold *Nollan* "substantial advancement" test. Indeed, the court's main discussion of *Dolan* concerned no live issue in the case; the court was merely bending over backwards in deference to the city in order to reinforce the meritlessness of the city's post-trial motion for a judgment notwithstanding the verdict. The city's attempt now to distinguish, on a constitutional level, development "exactions" from "denials" creates a distinction without a difference in the real world of land development application processing because *exactions and denials are used interchangeably* to leverage the police power to sometimes unconstitutional effect. Here, as proven at trial, conditions on use (exactions) and denials were applied over a period of years by Monterey for shifting and inconsistent reasons, which had the effect of securing private land as *de facto* public open space. After all, as the record shows in this case, a denial was simply an exaction *in extremis*.

Injury is done to the Constitution's great themes -- of separating governmental powers, of protecting individual rights, of insuring federalism -- by the arguments of the city and its *amici*. Here, if the local,

state and federal governments have it their way, an individual right would take a back seat to the convenient prerogatives of the majority, whether the as-applied police power action is local, state or federal, and neither a state nor federal court could realistically intercede to do what is just under the Constitution's Takings Clause. The Court of Appeals below did not abuse the Constitution nor this Court's decisions nor common sense.

## ARGUMENT

### I. IF NEITHER JUDGE NOR JURY CAN WEIGH THE EVIDENCE OF AN AGENCY'S LAND USE DECISION WHERE A PROPERTY OWNER CLAIMS A TAKING, THEN THIS COURT'S TAKINGS CLAUSE CASE LAW IS NUGATORY.

The courts below, after exhaustive fact finding and application of the law, found a regulatory taking of the owner's land by the city. The city now asks this Court to ignore those findings and to go beyond the normal deference accorded governmental actions affecting land use. The city is asking this Court to rule that where the Fifth Amendment's Takings Clause is at issue, no court can look into the asserted "reasonableness" of the city's action, irregardless, apparently, of that action's effect on a citizen's Fifth Amendment rights and the notion that the Just Compensation Clause is "an attempt to limit arbitrary sacrifice of the few to the many." Laurence H. Tribe,



*American Constitutional Law* § 9-6, at 605 (2d ed. 1988).

Under the city's reasoning, where a regulatory taking claim is made, the Constitution would offer only token protection to a citizen because the trier of facts could not weigh the evidence in a courtroom once the defending agency claims it acted reasonably. But what agency or city does not make such a defense in every such case?

As will be shown, Monterey's argument is directly contrary to this Court's takings jurisprudence. It would move the law from constitutional deference to abdication in this one arena of the Bill of Rights.

Additionally, the Court of Appeals' discussion of the "reasonableness" standard is in the context of the "reasonable relationship" test used by many state courts and referred to in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1429 (9th Cir. 1996) (*Del Monte Dunes II*). The Court of Appeals said nothing extraordinary, and the city overreaches by arguing otherwise.

Over the decades, this Court has been clear that when it comes to determining a land use taking, the "particular circumstances" of each case must be analyzed because these are "essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (tower denied over an historic train terminal). See *Kaiser Aetna v. United States*, 444 U.S.

164, 175 (1979) (navigational servitude on a marina-related subdivision); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 649-50 (1981) (Brennan, J., dissenting) (challenge to rezoning and adoption of open space plan); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (cable television facilities attached to apartment building); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 349 (1986) (residential subdivision denied); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 474, 495 (1987) (challenge to coal subsidence statute); *Hodel v. Irving*, 481 U.S. 704, 714 (1987) (challenge to land consolidation statute); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (residential development denied).

Some of the above cases involved as-applied challenges, others were facial; some involved regulatory takings, others were physical; some involved development denials, others conditions on development; some involved 42 U.S.C. § 1983, others did not; some were from state courts, others federal. But they *all* concerned the Takings Clause and *not one* established a rule of governmental insulation from judicial scrutiny as pressed by the city here. Rather, as explained by this Court in the rent control case of *Yee v. City of Escondido*, a takings allegation "necessarily entails complex factual assessments of the purposes and economic effects of government actions." 503 U.S. 519, 523 (1992). See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("the [taking] question depends on the particular facts . . ."); *Berman v. Parker*, 348 U.S.

26, 32 (1954) ("each [takings] case must turn on its own facts.").

This Court's consistent emphasis on a case-by-case factual assessment in the takings context (based on rules discussed in Argument II below) stems from Justice Holmes' admonition that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal*, 260 U.S. at 415. As Professor Rose has observed, real property is a uniquely vulnerable regulatory target. "Land is the perfect object for confiscatory regulation, because the owner cannot pick it up and take it away ...." Carol M. Rose, *Takings, Federalism, Norms*, 105 Yale L.J. 1121, 1126 (1996) (book review). Indeed, in reviewing Professor Fischel's comprehensive book on takings, she (as did he) notes that the citizen most apt to be treated unfairly and to lose its property to the majority is the citizen that owns land that is undeveloped and is subject to local regulatory power. *Id.*; William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* 105, 139, 204, 271 (1995). A citizen, in other words, precisely situated like *Del Monte Dunes at Monterey, Ltd.*

It is this "singling out" phenomenon that the City of Monterey (and its *amici*) wishes to ignore in its argument for *de facto* immunity from judicial scrutiny of its land use regulatory actions in this case. As recounted by the Court of Appeals in its first decision in this case, the land owners made five separate applications over as many years to use its property, all in conformance with

the city's general plan and zoning ordinance, only to be denied each use even though, by the fifth denial, the "city council did not base its denial upon failure to meet any of the specific numbered conditions." *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1505 (9th Cir. 1990) (*Del Monte Dunes I*). Instead, "the city council abruptly changed course and rejected the [fifth] plan, giving only broad conclusory reasons." *Id.* at 1508. These deliberate, multi-year actions, based on no "substantial advancement" of a legitimate state interest, assured that the subject private property would remain "useless." Thereafter, the State of California purchased the land for public open space.

Whether government has acquisition on its mind or not, this Court has stated that "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Professor McUsic observes that *Armstrong's* principle condemning the "singling out" phenomenon carries straight through this Court's regulatory taking cases to *Dolan*. Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problems of Takings*, 92 Nw. U.L. Rev. 591, 642, 646 (1998). In a non-doctrinaire explanation of takings law, including the recent *Lucas* and *Dolan* decisions, Professor McUsic relates that these cases' "[land use] regulations violate the Constitution not for the now discredited [*Lochner*



era] reason that they single out a particular class for economic harm, but because they single out individuals within a particular class for economic harm." *Id.* at 652. And nowhere is a U.S. citizen more at risk of losing his or her Fifth Amendment property rights, based on a broad consensus of land use commentators as well as review of lower court decisions, than in California. William A. Fischel at 226-31; Dennis J. Coyle, *Property Rights and the Constitution: Shaping Society Through Land Use Regulation* 113-14 (1993).

It should be the impartial fact finder, not the defending government, that decides the "reasonableness" of that government's actions when a citizen's constitutional right is at stake in court. The city's reasonableness argument is particularly mischievous given the extraordinary barriers already facing any citizen trying to get a takings claim before a court, federal or state, on the merits. First, "[t]he lower federal courts have vigorously applied the Supreme Court's ripeness doctrines to refuse jurisdiction in as-applied taking cases." Daniel R. Mandelker, *Land Use Law* § 2.26, at 44 (4th ed. 1997). See *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald*, *supra* (1986). As the Ninth Circuit itself has recognized, "ruling case law makes it very difficult to open the federal courthouse door for relief from state and local land use decisions." *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989).

In a survey of all regulatory taking cases involving as applied challenges to land use actions, decided in the lower federal courts between 1990 and 1997, it was found that 81% of the takings claims never reached the merits in the district courts. For those claimants who continued through the courts of appeals, more than half saw their takings claims deemed unripe. *Private Property Rights Implementation Act: Hearings on H.R. 1534 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong., 1st Sess. 1-4 (1997) (statement of John J. Delaney, Esq., retained by NAHB). See also Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. Land Use & Envtl. L. 91 (1994).

Indeed, counsel for a well-known firm that generally represents local governments in land use matters agrees that the ripeness doctrine, in state as well as federal court, is "the municipality's best friend." Michael K. Whitman, *The Ripeness Doctrine in the Land Use Context: The Municipality's Ally and the Landowner's Nemesis*, 29 Urb. Law. 13, 14 (1997). The Court need only reflect on the ripeness arguments made last term in *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997), to appreciate the lengths to which local, state and federal governments will go to keep a land use litigant out of court.

Second, if a property owner can somehow overcome the ripeness doctrine (as in *Del Monte Dunes*

I, with five development applications), he or she then usually encounters the abstention doctrine. And while "the Supreme Court has frequently stated that abstention is the exception rather than the rule, the federal courts often abstain in land use cases." Daniel R. Mandelker, § 8.38, at 376.

Finally, assuming a citizen makes it before a judge and jury in state or federal court, there are "few cases" where "courts have awarded damages in § 1983 land use cases," and "most state courts do not award compensation in taking cases." Daniel R. Mandelker, Jules B. Gerard, and Thomas E. Sullivan, *Federal Land Use Law* § 1.05[6], at 1-20 (1986, rev. 1998). Given this Court's rulings in *Agins* (1980), *Keystone* (1987) and *Yee* (1992), a facial takings challenge is extremely hard to sustain (to bring one is to face an "uphill battle," *Keystone*, 480 U.S. at 495). Yet the inevitable implication of Monterey's argument on "reasonableness" would be to make an as-applied challenge equally onerous, if not virtually impossible. The courthouse door, federal and state, would be effectively closed to citizens with land use takings claims.

Three prominent law and planning professors/practitioners (one of whom is currently president of the American Planning Association), in a major essay, admit that the current system of presuming the constitutionality of municipal land use regulation has gone too far because the presumption has led to abuses of individual rights in the United States. Ann Louise Strong, Daniel R. Mandelker, and Eric Damian Kelly, *Property Rights and*

*Takings*, 62 J. Am. Plan. Ass'n 5 (1996). While the City of Monterey argues to this Court that it should tighten even further the traditional judicial deference accorded a government's land use decision, and that this tightening should be cast as a constitutional rule, Professors Strong, Mandelker and Kelly argue precisely the opposite -- that, if anything is changed, the constitutional presumption should be *shifted* where a citizen makes out a good case of a regulatory taking, whether it involves an exaction or outright denial of use.

Courts have shifted the presumption to be against regulation in cases of exclusionary zoning; of arbitrary downzoning; and of regulations discriminating against vulnerable uses, such as group homes and unrelated families. This is only a partial list. Some of these cases are totally unrelated to takings claims arising out of economic impact on property, but they can raise legitimacy of purpose questions that are important in takings litigation. Courts should continue to shift the presumption against land use regulations in appropriate cases . . . . One logical area in which to shift the presumption is in "exactions" cases . . . .

*Id.* at 12.

\* \* \* \*

What has brought the [taking] issue to



the forefront is the frustration of many individual citizens and property owners with the complexity of a regulatory system that often involves multiple entities of government and multiple sets of regulation by a particular entity. In the absence of alternative uses or of administrative relief, landowners have, over the last two decades, begun to seek monetary relief for their perceived wrongs . . . .

In those cases where the system is unfair -- where the rules change in sudden or surprising ways, where a particular landowner is arbitrarily required by regulation to bear a disproportionate share of the burden of implementing public policy, where a landowner is in fact left with no economically viable use of her or his land -- the system offers too few alternatives . . . .

*Id* at 15.

In *Keystone*, a regulatory taking case brought as a facial challenge under 42 U.S.C. § 1983 in federal court,<sup>4</sup> this Court stated that:

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<sup>4</sup> Given the varied challenges by Monterey's *amici* to this Court's regulatory takings jurisprudence, including the assertion by local and state governments that they should be effectively exempt from judicial scrutiny in the land use takings area, it is worth recalling that § 1983 was enacted to protect citizens from

*Pennsylvania Coal* instructs courts to examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature. In *Pennsylvania Coal*, that inquiry led the Court to reject the Pennsylvania Legislature's stated purpose for the statute . . . . In this case, we, the Court of Appeals, and the District Court, have conducted the same type of inquiry the Court in *Pennsylvania Coal* conducted, and have determined [a different outcome].

480 U.S. at 487 n.16.

*Lucas* drove the *Keystone* judicial inquiry point home. In an as-applied takings case, giving complete deference to legislative findings is misplaced and unfair because it ignores how an individual citizen's rights are treated by a specific governmental action; the Fifth Amendment requires a "total taking inquiry" into a case's circumstances. 505 U.S. at 1030. "South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public

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violations of their constitutional rights under color of state law, including, *inter alia*, the specific problem of takings without just compensation. *Monell v. Department of Social Services*, 436 U.S. 658, 685-87 & n.45 (1978).

interest . . . ." *Id.* at 1031. Of course, as found below in this case, Monterey "abruptly changed course" and did no more than offer "conclusory reasons" for its action, *Del Monte Dunes I*, at 1508, an action that "forced Del Monte to bear the burden of creating open space for the public to enjoy." *Del Monte Dunes II*, at 1434.

The Court of Appeals (and the District Court) did nothing more than apply 76 years of this Court's regulatory takings law and some common sense to the circumstances of this case.

**II. THE COURT OF APPEALS PROPERLY APPLIED THIS COURT'S REGULATORY TAKING TESTS TO THE FACTS BY DISCUSSING DOLAN'S "ROUGH PROPORTIONALITY" STANDARD, A SUBSET OF THE NOLLAN "SUBSTANTIAL ADVANCEMENT" TEST, IN A JUDGMENT NOV CONTEXT AFTER THE CITY HAD FAILED THE NOLLAN TEST.**

The city's *Dolan* argument is a red herring on several levels, most importantly because the city never passed the threshold substantial advancement test of *Penn Central*, *Agins* and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In inverse condemnation law, there are "regulatory" takings and "physical" takings. *Lucas*, 505 U.S. at 1028 n.15; *Yee*, 503 U.S. at 522; *San Diego Gas & Electric*, 450 U.S. at 651-53 (Brennan, J., dissenting). See Steven J. Eagle, *Regulatory Takings* § 7-4(c), at 251 (1996). First and

foremost, *Del Monte Dunes* is a regulatory taking case. So were *Penn Central* and *Agins*, cases in which, as in *Del Monte Dunes*, the property owners claimed that denial of use had triggered a taking. This Court's two-pronged regulatory takings test -- that a taking occurs where "the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land," *Agins*, 447 U.S. at 260 -- was first articulated by this Court in *Penn Central*, 438 U.S. at 127, 138.<sup>5</sup>

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<sup>5</sup> In a remarkable argument, the United States, eighteen years after *Agins*, now contends that the takings test enunciated there is just "dictum" and therefore should be renounced. Br. for United States as Amicus Curiae at 21 (No. 97-1235). But the Court in *Agins* concluded that "the zoning ordinance on its face does not take the appellants' property," 447 U.S. at 259, stated the two-prong takings test, *id.* at 260, then held that "[i]n this case, the zoning ordinances substantially advance legitimate governmental goals." *Id.* at 261. In fact, after so holding, the Court never then addressed the alternative, economically viable use prong because of its holding on the "substantial advancement" prong. Additionally, the Court later held in *Nollan* that because there was no substantial advancement of a legitimate state interest in that case, a taking had occurred. The new-found U.S. assertion that the two-prong takings test was not a holding in *Agins* is explicitly contradicted by this Court in *Keystone*, 480 U.S. at 485.



Second, nowhere in *Agins* or *Penn Central* or *Nollan* did the Court hold that the substantial advancement test required a land dedication component. To the contrary, in *Ehrlich v. City of Culver City*, which concerned development fees, this Court issued a writ for certiorari, vacated judgment and then remanded the case to the California Court of Appeal for further consideration in light of *Dolan*. 512 U.S. 1231 (1994). Ultimately, the California Supreme Court agreed with this Court. *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), *cert. denied*, 117 S. Ct. 299 (1996).

Finally, it must be noted that the United States did not dispute the *Penn Central/Agins* “no substantial advancement of a legitimate state interest” test in *Williamson County*, which, like *Del Monte Dunes*, also concerned a § 1983 jury trial. After arguing that the taking issue was not ripe, the U.S. argued alternatively that no taking had occurred because the zoning and subdivision regulations as applied to the subject property “clearly advanced legitimate state interests.” Br. for United States as Amicus Curiae at 18 (No. 84-4). The U.S. then moved on to argue satisfaction of *Agins*’ “economic use” test. *Id.* at 22. Nor did the U.S. dispute the two-prong test in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987), where the government argued (unsuccessfully) that the Fifth Amendment did not require just compensation as the remedy for regulatory takings. Br. for United States as Amicus Curiae (No. 85-1199). In

There, despite a development denial, the Court found no taking because the existing building on the site (Grand Central Terminal) had not been interfered with “in any way” and because the property owner had received “valuable” transferable development rights from the city. *Id.* at 136, 137.

The land use taking test was then given constitutional meaning as to remedy by *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987) (land use regulatory takings are compensable, including for temporary periods of time). The test’s “economic use” prong was later clarified by *Lucas* (denial of all use is a categorical taking; anything less requires a weighing of the three

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*Nollan*, the U.S., without disputing it, recited the two-prong test, Br. for United States as Amicus Curiae at 18 n.14 (No. 86-133), and argued favorably in its behalf. *Id.* at 20-21. Nor did the U.S. dispute the test and call it dictum in its *Dolan* arguments. Br. for United States as Amicus Curiae (No. 93-518).

This Court, by contrast, has been clear and consistent. In *Agins*, it held no taking occurred because there was a substantial advancement of legitimate state interests. In *Nollan*, it held a taking did occur because there was no substantial advancement of legitimate state interests. In *Keystone*, it stated that the two-prong takings test is a holding. Win a case, lose a case, but law is law, or should be.

factors enunciated in *Penn Central*: economic impact on the claimant, extent to which the regulation interfered with distinct investment-backed expectations, and character of the governmental action, 438 U.S. at 124).

Meanwhile, the "substantial advancement" prong of the takings test was clarified by *Nollan* (1987) and by *Dolan* (1994). Taken together, these cases require a close fit, or nexus, between regulatory means and ends. Importantly, if the government does not pass the *Nollan* substantial advancement test, the *Dolan* rough proportionality inquiry is analytically superfluous.

In short, the *Penn Central*/*Agins* test, repeatedly used by this Court in a variety of settings (see *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Keystone*, 480 U.S. at 485; *Nollan*, 483 U.S. at 834; *Lucas*, 505 U.S. at 1016; *Dolan*, 512 U.S. at 385; see also *San-Diego Gas & Electric*, 450 U.S. at 647, 648 (Brennan, J., dissenting)), is grounded in "regulatory taking" cases, of which *Dolan* is one, involving denials as well as conditional approvals. As this Court noted in *Yee*, *Nollan*'s nexus requirement is a regulatory taking concept. 503 U.S. at 530, 534.

The City of Monterey's attempt to distinguish development "exactions" from "denials" creates a distinction without a difference in the actual world of land development application processing. Sometimes applications are denied; sometimes they are approved with conditions; sometimes they are denied and later approved with conditions. And sometimes a citizen is

strung along for years on the exaction/denial continuum. That is exactly what happened here. For purposes of the Fifth Amendment, *Del Monte Dunes*, like every land use taking case cited above from *Penn Central* (1978) to *Suitum* (1997), concerns alleged (and here, proven) use of the police power to transform a private property interest into public use without just compensation.<sup>6</sup> That is the constitutional core of all of the above-cited cases, including the Court of Appeals' opinion in *Del Monte Dunes II*. The court below properly applied this Court's regulatory taking tests to uphold this Fifth Amendment principle.

*Dolan* reinforces the fact that *Nollan*'s nexus requirement derives from *Penn Central*, a case, like *Del Monte Dunes*, concerning the denial of a development application. 512 U.S. at 388. In a thoughtful article, Professor Laitos elegantly ties together this Court's takings cases from *Armstrong* (1960) to *Dolan* (1994), explaining how John Rawls' philosophy of "justice as fairness" reverberates in the Court's application of the

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<sup>6</sup> As the court below explained, the evidence established "that the City progressively denied use of portions of the Dunes until no part remained available for a use inconsistent with leaving the property in its natural state." *Del Monte Dunes II*, at 1433. In short, the use "conditions" required by Monterey were the functional equivalent of an "exaction" of the property, which the city then formalized with its "denial" of the fifth application.



Takings Clause. Jan G. Laitos, *Takings and Causation*, 5 Wm. & Mary Bill Rts. J. 359 (1997); see also Gus Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 Rutgers L.J. 15, 59-69 (1983) (cited in *Williamson County*, 473 U.S. at 199 n.17). Laitos recognizes *Del Monte Dunes II* as an example of the *Armstrong-to-Dolan* principle of limiting government's ability to require a few to bear the burdens for the many. Jan G. Laitos at 363 n.25; 379 n.115. He writes, "[c]rucial to *Dolan's* test is 'impact' -- the Court must expect [to] find that the planned property use will cause a societal problem that the government action intends to alleviate. Absent causation, as in *Dolan*, a regulation violates *Armstrong's* notion of fairness and Rawlsian requirements of equality." *Id.* at 370-71. See also Leigh Raymond, Comment, *The Ethics of Compensation: Takings, Utility, and Justice*, 23 Ecology L.Q. 577 (1996).

Several lower courts have recognized the proper role of *Dolan* in this Court's regulatory takings jurisprudence. For example, *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), *cert. denied*, 117 S. Ct. 299 (1996), concerned a scenario where a development application was *denied* by the city, the landowner filed suit for damages, the city then reversed its position and approved the application but on condition that certain fees be paid by the owner to the city, and the owner then amended his complaint to allege that the fees amounted to an unconstitutional taking. The state supreme court held that one of the development fees violated *Dolan*

after first finding that the fee met the *Nollan* test. Similarly, in *Clark v. City of Albany*, 904 P.2d 185 (Or. App. 1995), *rev. denied*, 912 P.2d 375 (Or. 1996), the state court found that a street improvement required of a developer violated *Dolan's* "rough proportionality" standard while another requirement did not. See also *Northern Illinois Home Builders Ass'n v. County of DuPage*, 649 N.E. 2d 384 (Ill. 1995). In *Christopher Lake Development Co. v. St. Louis County*, 35 F.3d 1269 (8th Cir. 1994), a developer's site plan was *denied* by the county unless the developer would subsequently agree to build a storm water drainage system for the entire watershed in which the subject property sat. Not until the developer built the system for the entire watershed did the county then approve the site plan for the single property. The developer sued, and the Court of Appeals, citing *Dolan*, agreed that "from our review of the record, the County has forced the Partnership to bear a burden that should fairly have been allocated throughout the entire watershed area." *Id.* at 1275.

The City of Monterey tries to draw a constitutional distinction between a development "denial" and "exaction" and then contends that *Del Monte Dunes II* fatally misapplied *Dolan's* "rough proportionality" standard. But as the above sampling of cases shows, as do the facts of *Del Monte Dunes* itself, "denials" and "exactions," which are cut from the same regulatory cloth by localities acting in the development process, are sometimes used interchangeably to leverage the police power in order to accomplish ends that go

beyond the constitutional limit.<sup>7</sup>

It should not be the case -- and under this Court's precedents it is not -- that government can deny an application and defeat the Fifth Amendment by proclaiming pretextual rationales that relate neither in nature nor extent to the impacts of the proposed use. Of course, where the proffered reasons for a denial bear no substantial advancement of a legitimate state interest, the

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<sup>7</sup> As for the city's argument that *Dolan* cannot be applied to a development denial, it must be noted that the facts of *Del Monte Dunes* belie that position. After five applications, the city refused to permit use of the property even though conditions previously specified by the city had been substantially met by the owner. *Del Monte Dunes I*, at 1506. In addition to demonstrating the illegitimacy of the city's denial (the *Nollan* test), the denial was not roughly proportional to the impacts of the housing development because the concessions made by the landowner met the earlier stated concerns of the city and properly mitigated the project's impacts. Of course, the fact that the city would have continued to leverage ever more concessions (or exactions) beyond the five applications should not stand in the way of finding that the concessions the city sought to expand were not roughly proportional to the shifting reasons given by the city for denying the application. Both sides of the equation are present here; the ratio between the conditions and the project's impacts is so out of balance that even rough proportionality would not be satisfied.

question of proportionality is not critical since the *Dolan* rough proportionality standard is only relevant if the *Nollan* substantial advancement test has been met by the government.

Here, as the Court of Appeals made clear, *the City of Monterey never got past the "substantial advancement" prong of the takings test* laid down by *Penn Central* and *Agins* and explicated in *Nollan*. The court began by observing that "[t]o prevail on its inverse condemnation claim, Del Monte had to show that the City's actions (1) did not substantially advance a legitimate public purpose; or (2) denied it economically viable use of its property. *Nollan v. California Coastal Comm'n* [cite]." *Del Monte Dunes II*, at 1428. The court then found that "substantial evidence" in the record supported a finding that each prong of the regulatory takings test had been violated, and the court repeatedly emphasized that the jury had considered evidence on the substantial advancement "issue" or "theory." *Id.* at 1428-30. Indeed, the city did not object to the jury instruction on the *Nollan* issue. *Id.* at 1429.

The Court of Appeals' main treatment of the *Dolan* rough proportionality standard was triggered not because of any live issue in the case (the city had already failed the threshold test under *Nollan*) but simply to reinforce the meritlessness of the city's post-trial motion for a judgment notwithstanding the verdict. *Id.* at 1430-32. In that context, the court merely bent over backwards to give the city the benefit of doubt as it reviewed all the trial evidence:



*Even if the City had a legitimate interest in denying Del Monte's [fifth] development application, its action must be "roughly proportional" to furthering that interest . . . . For the purposes of reviewing the district court's denial of the City's motion for judgment notwithstanding the verdict, we assume that the City's stated interests of protecting the environment and health and safety of its citizens were legitimate.*

*Id.* at 1430 (emphases added).

In an earlier inverse condemnation case heard by this Court, also one with a jury trial, it was asked, "if a policeman must know the Constitution, then why not a planner?" *San Diego Gas & Electric*, 450 U.S. at 661 n.26 (Brennan, J., dissenting).<sup>8</sup> *First English* and *Nollan, Lucas and Dolan* answered that question as the progeny of *Pennsylvania Coal* and *Armstrong*. The Court of Appeals did not abuse those decisions nor did it forget that the Takings Clause is a part of the Bill of Rights.

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<sup>8</sup> Yet, the City of Monterey now asks this Court to give "due regard to the limited role of the Constitution in local land use decision-making." Br. for Petitioner at 27 (No. 97-1235).

## CONCLUSION

For the above reasons, and because citizens with rights in property should not be singled out and denied absolutely the opportunity to put their case to a jury (a jury, after all, of local taxpayers), the decision of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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No. 97-1235

**In the Supreme Court of the United States**

OCTOBER TERM, 1998

CITY OF MONTEREY, PETITIONER,

v.

DEL MONTE DUNES AT MONTEREY, LTD. AND MONTEREY-  
DEL MONTE DUNES CORPORATION, RESPONDENTS.

**On Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit**

**BRIEF AMICUS CURIAE OF THE  
AMERICAN FARM BUREAU FEDERATION AND  
THE CALIFORNIA FARM BUREAU FEDERATION  
IN SUPPORT OF RESPONDENTS**

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## QUESTIONS PRESENTED

*Amici Curiae* will address the following questions:

1. Whether the "rough proportionality" requirement of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), applies to regulatory takings claims in general.
2. Whether a private property owner's sale of property to the government precludes the property owner's action for a taking.
3. Whether the Takings Clause requires close judicial scrutiny of land-use regulations effecting a substantial diminution in the value of private property, where those regulations are not generally applicable but are applied on an individualized basis through adjudicative determinations.

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**BRIEF AMICUS CURIAE OF THE  
AMERICAN FARM BUREAU FEDERATION AND  
THE CALIFORNIA FARM BUREAU FEDERATION  
INTERESTS OF THE AMICI CURIAE<sup>1</sup>**

The American Farm Bureau Federation ("AFBF") is a voluntary general farm organization established in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 4.8 million member families. AFBF has participated as an *amicus* in this Court in support of private property rights in cases such as *Lucas v. South Carolina Coastal Council*, *Dolan v. City of Tigard*, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, *Bennett v. Spear*, and *Suitum v. Tahoe Regional Planning Agency*. Amicus California Farm Bureau Federation is a constituent member of AFBF, representing the interests of farmers and ranchers in the State of California, where the property at issue in this case is located.

The AFBF and California Farm Bureau Federation have a direct stake in the outcome of this case. Their farmer and rancher members own or lease significant amounts of land, and their ability to use it productively is critical not only to their livelihoods, but to the nation's supply of food and other basic necessities. This land is increasingly subject to control by state and local authorities acting under statutes and ordinances such as the land-use regulations involved in this

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<sup>1</sup> The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.



case. *Amici*, therefore, have a vital interest in ensuring that the Takings Clause is interpreted fairly, so that farmers and ranchers are able to obtain just compensation when government regulation diminishing the value of their land goes "too far."

### STATEMENT

In *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), this Court interpreted the Takings Clause to require the government to show that any regulatory exaction of private property "is related both in nature and extent to the impact of the proposed development." This case raises the question whether *Dolan's* "rough proportionality" standard extends to regulatory takings. In this brief, *amici* demonstrate that means-end scrutiny *at least* as rigorous as that required by *Dolan* is constitutionally mandated in all regulatory takings cases.

The property at issue (the "Dunes") consists of 37.6 oceanfront acres in the City of Monterey, California, zoned for multi-unit residential use. Pet. App. 27. In 1981, Ponderosa Homes, then the owner of the property, applied for permission to develop the Dunes into a 344-unit residential complex. This residential development complied with the City's zoning and density requirements. Nonetheless, the City's planning commission ("Commission") denied Ponderosa's proposal, suggesting that a proposal for a smaller development of 264 units would be favorably received. *Del Monte Dunes, Ltd. v. City of Monterey*, 920 F.2d 1496, 1502 (9th Cir. 1990) (*Del Monte Dunes I*).

Ponderosa prepared and submitted a proposal for 264 residential units. As it turned out, however, the Commission had not meant it when it led Ponderosa to believe that a 264-unit development would be approved. The Commission rejected the project in December 1983, this time telling

Ponderosa that a proposal for 224 units would be favorably received. 920 F.2d at 1502.

Once again, Ponderosa followed the Commission's instructions, submitting a proposal for 224 residential units. And once again, the Commission denied its application. On appeal, however, the City Council ("Council") ordered the Commission to consider a development of 190 units. Ponderosa subsequently submitted no fewer than four alternative site plans, each for 190 units, which the Commission rejected in July 1984. *Ibid.*

In September 1984, the Council again overruled the Commission and approved one of Ponderosa's 190-unit site plans, subject to 15 conditions (related principally to access, environmental issues, and architectural review) to be satisfied within 18 months. The Council expressly found "that the site plan as proposed is conceptually satisfactory and is in conformance with the previous decisions of this Council regarding density, number of units, location on the property, and in other respects." *Id.* at 1503. The Council also approved the proposed access route, which Ponderosa had modified to conform to the City's wishes. *Ibid.*

Over the next 18 months, respondents (collectively, "Del Monte"), which purchased the Dunes shortly after Ponderosa submitted the 190-unit application, prepared plans that complied with the City's stated conditions. Del Monte received approval from the Architectural Review Committee, after its review of such factors as exterior and interior design and the number, size, and shape of the subdivision's roads, parkways, and parking facilities. In August 1985, the Commission's professional planning staff also recommended approval. The staff stated that "it appears that the conditions of approval have been addressed and substantially met by the applicants' tentative map." *Id.* at 1504. The Commission's staff further reported that the development's design was

(i) "consistent with the objectives, policies, general land uses, and programs of the City's adopted General Plan and Del Monte Land Use Plan"; (ii) "not likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat"; and (iii) "not [in] conflict with easements acquired by the public at large for access through or use of [the] property." 920 F.2d at 1504.

The Commission nonetheless denied the proposal, and the Council concurred. The Council did not base its decision on Del Monte's failure to meet any of the 15 conditions specified in the Council's earlier resolution. Nor did the Council "base this conclusion on any facts brought out by its staff or at the hearing." Rather, the Council cited "generalized findings" about the environment and access. *Id.* at 1505.

For example, although the Council had earlier found that Del Monte's site plan was "conceptually satisfactory and \* \* \* in conformance with [its] previous decisions \* \* \* regarding density, number of units, location on the property, and in other respects" (920 F.2d at 1503), it now found that "[t]he site is not physically suitable for the type and density of development proposed." *Id.* at 1504. Similarly, although the Council earlier had approved Del Monte's plans for access to the property—which Ponderosa had modified in response to the Council's request—it now proposed an entirely different access route, over the land of a neighboring owner. *Id.* at 1505. And although the Council did not dispute that it earlier had approved Del Monte's environmental restoration plan, that the U.S. Fish & Wildlife Service had registered no objection to the development, or that Del Monte had set aside 17 acres of habitat for the Smith's Blue Butterfly, it suddenly found that Del Monte had failed to provide adequate assurance that the Smith's Blue Butterfly would be protected. *Id.* at 1506; Pet. App. 17. In short, "the same three members of the city council that had approved the development with certain conditions abruptly changed course

and disapproved the plan even though the conditions specified had been substantially met." 920 F.2d at 1506.

Subsequently, the State of California bought Del Monte's property. The State paid more for the property than Del Monte had paid for it—but considerably less than its value as a development parcel. The State turned the property into a public "butterfly park." *Id.* at 1509.

Respondent then filed suit in district court, alleging that the City's denial of its proposed development violated the Takings and Equal Protection Clauses. On remand to the district court following the litigation in *Del Monte Dunes I*, the district court ordered those claims tried to a jury. The jury returned a verdict in Del Monte's favor on both claims, awarding it \$1,450,000. The Ninth Circuit affirmed.

The Ninth Circuit rejected the City's claim that the evidence was insufficient to support the takings verdict. Noting that a party can prevail on its takings claim under two distinct theories—either by proving that the challenged "land-use regulation does not substantially advance legitimate state interests" or by proving that it "denies an owner economically viable use of his land"—the court found sufficient evidence to support each theory. Pet. App. 16. With respect to the first theory, the court held that there was ample evidence for the jury to find no reasonable relationship between the City's stated objectives and its actions. Given the City's abrupt change of position, a jury easily could have concluded "that the City's reasons for denying [Del Monte's] application were invalid and that it unfairly intended to forestall any reasonable development of the Dunes." Pet. App. 19. With respect to the second theory, the court held that where "government action relegates permissible uses of property to those consistent with leaving property in its natural state (*e.g.*, nature preserve or public space), and no competitive market exists for the property without the



possibility of development," the jury may reasonably find a taking. Pet. App. 23.

## INTRODUCTION AND SUMMARY OF ARGUMENT

1. The Takings Clause requires strict scrutiny of all land-use regulations that substantially diminish the value of private property. The text, history, and constitutional role of the Takings Clause demonstrate that government may not, merely by asserting a "legitimate state interest," deprive individuals of their property without paying just compensation. Because this Court has recognized that the Takings Clause is not intended merely to prevent physical intrusions upon private property, but also to limit regulatory interferences with property rights, it makes no sense to hold that compelled dedications of real property are the only form of land-use regulation subject to heightened means-end scrutiny. This Court should hold that *at least* the exacting scrutiny required by *Dolan* extends to all types of regulatory takings.

2. Irrespective of the applicability of *Dolan*, the record supports affirmance on the alternative basis that the City's actions deprived Del Monte of "all economically viable use of its property." The United States errs when it suggests that the State's purchase of the Dunes, for a price greater than Del Monte originally paid for the land, precludes such a finding. That argument wrongly focuses on whether government has deprived private property of all of its *value*, rather than whether regulation has prevented its profitable *use*. Moreover, it erroneously assumes that only a *complete* elimination of property value amounts to a taking, whereas a substantial diminution in value may also constitute a compensable taking. To allow government to avoid market-value compensation for a taking simply by purchasing the property for a dollar more than was paid for it would create a perverse incentive for government to use restrictive land-

use regulations to force land sales and obtain property for far less than its market value.

3. Courts appropriately apply exacting scrutiny to government decisions the effect of which is concentrated on discrete groups or individuals. Such scrutiny is required here: the City is vested with broad discretion in the application of its zoning laws, and decisions whether to grant variances are made on a case-by-case basis. Del Monte has been singled out among area landowners and effectively forced to create a public "butterfly park." However desirable the City's environmental goals may be, the Fifth Amendment mandates payment of just compensation if Del Monte is to contribute its property to the City's cause.

## ARGUMENT

For the framers of our Constitution, private property supplied "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government." J. Nedelsky, *Private Property and the Limits of American Constitutionalism* 9 (1990). The Framers understood the protection of property rights—rights in land in particular—as "the first object of government." *The Federalist No. 10*, at 78 (James Madison) (C. Rossiter ed., 1961).

The Takings Clause lies at the heart of the constitutional scheme to protect private property rights from the grasp of transient political majorities; it was carefully crafted "to bar Government from forcing some people alone to bear burdens which, in all fairness, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Although the Constitution grants government the power to deprive a person of property for a public purpose, the exercise of that power is strictly conditioned upon the payment of just compensation.

In this case, Monterey sought to circumvent the just compensation requirement by gamesmanship with its land-use regulations. Rather than exercise its right of eminent domain over Del Monte's beachfront property, the City instead used its regulations to force Del Monte to create a public "butterfly park." To its credit, the jury recognized this for what it was. The jury properly understood that a regulatory deprivation of property rights must be carefully scrutinized to ensure proper application of the Takings Clause. The prominence of private property rights in our constitutional structure—as well as this Court's precedents—make clear that the jury and the court below got it right.

**I. LAND-USE REGULATIONS THAT SUBSTANTIALLY DIMINISH THE VALUE OF PROPERTY ARE SUBJECT TO CLOSE JUDICIAL SCRUTINY UNDER THE TAKINGS CLAUSE**

The United States urges this Court to endorse the same sort of "rationality or reasonableness review" in takings cases that is applied "[i]n a variety of contexts" ranging from due process "challenges to economic regulation" to cases brought "under the Equal Protection Clause." *Amicus Br.* of the United States 17. According to the United States, landowners may recover compensation only if a land use regulation fails to satisfy "deferential" lower-tier scrutiny. *Id.* at 20. Lower-tier scrutiny, however, would gut the Takings Clause. It is wholly inconsistent with the text, history, and purpose of the just compensation requirement, which demand exacting scrutiny comparable to that directed at government action that infringes on other fundamental constitutional rights. *At a minimum*, such scrutiny requires that government pay compensation when land-use regulations substantially diminish the value of property, unless the regulation is a reasonably proportionate response to some compelling governmental concern, such as the abatement of a nuisance on the property.

**A. The Takings Clause Does Not Contemplate Deferential Scrutiny**

To permit states and municipalities to deprive private citizens of their property without compensation simply to "advance legitimate state interests" would strip the Takings Clause of its central purpose of preventing redistribution of private property by transient political majorities. It is indisputable that "such a justification can be formulated in practically every case." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992); see also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 513 (1987) (Rehnquist, C.J., dissenting) ("nearly every action the government takes" can be characterized as preventing some grave public harm). As a practical matter, then, scrutiny of government action to see if it is rationally related to a legitimate state interest is tantamount to no scrutiny at all. Justice Holmes warned of this result in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922):

When th[e] seemingly absolute protection [of the Just Compensation Clause] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

The text, history, and central constitutional role of the Takings Clause demand much more exacting scrutiny of land-use regulations. That provision unambiguously states that "private property [shall not] be taken for public use, without just compensation." For the common good, government may deprive a person of property—but only upon payment of just compensation. To hold that the requirement of just compensation does not apply where a taking serves a legitimate public purpose would effectively *repeal* the



Takings Clause, for that Clause *presumes* that the government is taking property "for public use."

The history of the Takings Clause confirms that is supposed to have more teeth. The payment of compensation when government took property for the common good was "a principle of the common law \* \* \* of immemorial usage" (W. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 583 (1972)), and continued "protection of private property was a nearly unanimous intention among the founding generation." M. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Cal. L. Rev. 267, 270 (1988). See generally J. Story, *Commentaries on the Constitution of the United States* 510-511 (R. Rotunda & J. Nowak eds. 1987). There is no indication that the Framers thought a broad swathe cut through the middle of this principle entitled government to take property without compensation where it could conjure up some argument that the exaction was "reasonable."

To the contrary, the Framers regarded protection of individual property rights as a central goal of government. "Government," wrote James Madison, "is instituted no less for protection of the property than of the persons of individuals." *The Federalist No. 54*, at 339 (C. Rossiter ed., 1961). The Framers would have been shocked at the notion that just compensation is unnecessary if government action survives lower-tier-type scrutiny.

The Takings Clause disciplines government by forcing it to weigh the benefits to the community of depriving a person of his property against the constitutionally mandated compensation that would have to be paid for the taking. Property can always be taken for the common good—provided the government is willing to pay the bill. Hence the distrust of government underlying our constitutional structure of separated

powers and checks and balances and our Bill of Rights can clearly be seen at work in the Takings Clause, which imposes a taxpayer burden to check the excessive zeal of regulatory bodies. The Takings Clause, moreover, requires the government to treat individuals with dignity by ensuring that, if government takes their property, it compensates them for that intrusion.

Finding "no warrant in the laws or practices of our ancestors" for governmental "'authority [to] inva[de] private right under the pretext of the public good'" (*United States v. Lynah*, 188 U.S. 445, 470 (1903)), this Court has long recognized that the Takings Clause is designed to shield individual rights from government action that would convert one person's property to community use. See *Armstrong*, 364 U.S. at 49; *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (the Clause "prevents the public from loading upon one individual more than his just share of the burdens of government"). Lower-tier scrutiny of land-use regulations is inconsistent with this purpose. The teaching of the Takings Clause is that where public benefits are achieved by depriving individuals of property, the costs "must be borne by all [of a community's] taxpayers [and not] imposed entirely on the owners of the individual properties." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 139 (1978) (Rehnquist, J., dissenting). The cardinal principle that should guide its interpretation is that government may *not* sacrifice the interests of some to benefit others: "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, 260 U.S. at 416; see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-842 (1987).

### B. Deferential Scrutiny Is Inconsistent With This Court's Recent Precedents

This Court has repeatedly rejected the argument, advanced here by the United States, that its scrutiny of takings claims is synonymous with the "rational basis" scrutiny that governs substantive due process and equal protection claims. In *Nollan*, 483 U.S. at 834, 835 n.4, the Court, in explicating "the standards for determining \* \* \* what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter," stated:

Contrary to Justice Brennan's claim, our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, not that "the State 'could rationally have decided' that the measure adopted might achieve the State's objective." Justice Brennan relies principally on an equal protection case and two substantive due process cases in support of the standards he would adopt. But there is no reason to believe \* \* \* that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical.

Likewise, in *Dolan*, this Court expressly refused to adopt the "reasonable relationship" test advocated by the United

States, reasoning that such a standard would be "confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment." 512 U.S. at 391. As this Court recognized, the "strong presumption of constitutional validity" applicable when land-use regulations are challenged on equal protection or due process grounds does not apply in cases challenging such regulation as violative of the Takings Clause. *Id.* at 392.

Viewed in terms of their practical effect on landowners, there is no basis for subjecting government "exactions" or "dedications" of the sort at issue in *Dolan* to heightened scrutiny, while sustaining even the most severe applications of other land-use regulations just because they loosely serve legitimate state interests. Repeated denials of a landowner's revised applications to develop a parcel of property—especially where, as here, the denials are not based on express terms in the municipality's land-use code, but on unwritten, discretionary, and ever-changing bases—can interfere with the profitable use of land just as harshly as dedications or exactions. Mrs. Dolan, after all, still could have used her land for a new hardware store even if 10% of it had been taken for a bike path; Del Monte, in contrast, has been deprived of *any* economically beneficial use of its land.

### C. The City's Actions Do Not Withstand The Close Judicial Scrutiny Mandated By The Takings Clause

Monterey's actions cannot survive strict means-end scrutiny. The City sought to justify its denials of Del Monte's numerous development proposals on the basis of "generalized findings" about the environment and access (*Del Monte Dunes I*, 920 F.2d at 1505), but never even attempted to demonstrate that its actions were proportional to "the impact of the proposed development" (*Dolan*, 512 U.S. at



391), let alone that they were justified by California nuisance law (*Lucas*, 505 U.S. at 1029). As the jury recognized, the City's conduct—in repeatedly denying Del Monte's revised development applications, while permitting "other properties surrounding the Dunes [to be] developed into residential units similar to the development proposed by [Del Monte] but without the environmental and access conditions" (*Del Monte Dunes I*, 920 F.2d at 1508)—completely belies any claim that it acted proportionally to an identified harm or was responding to the threat of a nuisance. In short, the City cannot impose its land-use regulations in this manner without paying just compensation.

## II. THE STATE'S PURCHASE OF DEL MONTE'S PROPERTY DOES NOT PRECLUDE A FINDING OF A TAKING

The principal focus of the briefs of the City and its *amici* is the (erroneous) claim that *Dolan's* "rough proportionality" standard does not apply outside the context of regulatory exactions. See, e.g., Pet. Br. 44-49; *Amicus* Br. for United States 10-15. Those briefs, however, largely ignore an alternative ground for affirmance: the Ninth Circuit's finding that the jury could reasonably have concluded that Del Monte was deprived of "all economically viable use of its property." Pet. App. 20. The United States does suggest that the State's purchase of the Dunes for conversion to a public park precludes such a finding—as if Del Monte, in acquiescing to the State's offer, was choosing the best of several profitable alternatives, instead of clutching a last opportunity to obtain *something* for a piece of property made useless, and of no interest to any other buyer, by the City's actions. *Amicus* Br. for United States 8. The Solicitor General's suggestion, however, is untenable.

The proper focus of inquiry is not whether the government has deprived a property owner of all *value* of his

property, but whether it has deprived him of all economically viable *use*. *Lucas*, 505 U.S. at 1017. As this Court has observed, regulation that "forever denies the owner any power to control the *use* of [its] property" is "perhaps the most serious form of invasion of an owner's property interests." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 436 (1982) (emphasis added); see Pet. App. 22 ("Although the value of the subject property is relevant to the economically viable use inquiry, our focus is primarily on use, not value"). And as Justice Scalia put it in his concurring opinion in *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1671-1672 (1997), "[i]f money that the government regulator gives to the landowner can be counted on the question of whether there is a taking (causing the courts to say that the land retains substantial value, and thus has not been taken), rather than on the question of whether the compensation for the taking is adequate, the government can get away with paying much less." Whether Del Monte received more than it paid for the Dunes may be relevant in determining whether it received just compensation, but it is not relevant to the determination of whether Del Monte was deprived of "all economically viable use of its property."<sup>2</sup>

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<sup>2</sup> In a normally competitive market, property values reflect the potential uses of property. But where, on account of highly restrictive land-use regulations, the government is the sole party interested in purchasing a parcel of property, it makes little sense to consider the price paid by the government in determining whether its actions constitute a taking. See *Suitum*, 117 S. Ct. at 1671 (Scalia, J., concurring) ("a cash payment from the government [does] not relate to whether the regulation 'goes too far' (i.e., restricts use of the land so severely as to constitute a taking), but rather to whether there has been adequate compensation for the taking").

"[R]egulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—[suggest] that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Lucas*, 505 U.S. at 1018. In light of Monterey's zoning classification (which precludes *other* uses of Del Monte's property (Pet. App. 26-27)), the City has stripped Del Monte's property of economically viable use. See *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir. 1988) ("Generally, the existence of permissible uses determines whether a development restriction denies a property holder the economically viable use of its property"); *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994) (characterizing the "economically viable use" inquiry as: "Are alternative permitted activities economically realistic in light of the setting and circumstances, and are they realistically available?"). The record supports affirmance on that basis—without regard to the applicability of *Dolan* in this context.

Even if the value of Del Monte's property were the relevant calculus, the argument that the State's purchase of the property necessarily means that no taking has occurred wrongly assumes that *only* a complete elimination of value constitutes a taking. To be sure, the *Lucas* Court held that land-use regulation that deprives a landowner of "all economically beneficial or productive use of [the] land" constitutes a taking and is "compensable without case-specific inquiry into the public interest advanced in support of the restraint." 505 U.S. at 1015. Contrary to the United States' assumption, however, this form of "categorical" taking is not the only form of taking proscribed by the Fifth Amendment. *Lucas*'s "categorical rule that total takings must be compensated" does not operate to the exclusion of the principle that

a substantial diminution in value can also be a compensable partial taking. See *id.* at 1026.

In fact, this Court in *Lucas* expressly rejected the dissent's contention that the categorical rule was arbitrary because "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value." 505 U.S. at 1064 (Stevens, J., dissenting). The Court observed that "[t]his analysis errs in its assumption that the landowner whose deprivation is one step short of completion is not entitled to compensation." *Id.* at 1019 n.8. The Court noted that "[s]uch an owner might not be able to claim the benefit of our categorical formulation," but "[t]he economic impact of the regulation on the claimant and \* \* \* the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally." *Ibid.* (citation omitted).

Although this Court has not yet had occasion to flesh out the partial takings inquiry outlined in *Lucas*, the Federal Circuit has squarely addressed it, concluding that substantial diminutions in value may amount to compensable takings. See *Florida Rock*, 18 F.3d at 1567-1569 (Fed. Cir. 1994) (finding that a taking may have occurred when the value of land was reduced by approximately sixty percent). The Federal Circuit correctly noted that "[n]othing in the language of the Fifth Amendment compels a court to find a taking *only* when the government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests." *Id.* at 1568.

Compelling policy reasons support reading the Takings Clause to require payment of just compensation for a taking even where the government has purchased the property for a higher price than the owner originally paid for it but for



less than its fair-market value for development or other commercial or agricultural uses. As the Ninth Circuit reasoned, "[f]ocusing the economically viable use inquiry solely on market value or on the fact that a landowner sold his property for more than he paid could inappropriately allow external economic forces, such as inflation, to affect the takings inquiry." Pet. App. 22. And, as the Court of Claims has observed, a property owner's receipt of offers "does not establish that there exists a solid and adequate fair market value," particularly where the offers received "were for far less than the value of the property" and "were not the product of negotiations between a willing buyer and seller under no duress." *Formanek v. United States*, 26 Cl. Ct. 332, 340 (1992).

More importantly, permitting the government to avoid liability for a taking solely because it purchased the subject property for more than was paid by the former owner would create a perverse system of incentives. A government body desirous of obtaining private land for public projects could simply regulate away the property's viable commercial uses and, having thereby driven off all potential buyers, offer to purchase the parcel for some minimal amount over what the owner paid. An owner who accepted that offer would, according to the Solicitor General, lose any right to recover through a takings action the fair market value of the property for reasonable commercial development. The Ninth Circuit was surely correct in holding that "the mere fact that there is one willing buyer of the subject property, particularly where that buyer is the government, does not, as a matter of law, defeat a taking claim." Pet. App. 23. The government should not be able to use restrictive land-use regulation as a

means of circumventing the requirement of just compensation and buying private property at a steep discount.<sup>3</sup>

Under the ad hoc test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), "[t]he economic impact of the regulation" and "the extent to which the regulation has interfered with distinct investment-backed expectations" are important factors in determining whether a regulation effects a taking. Here, those factors strongly support the jury's determination: Del Monte reasonably expected, upon its purchase of the Dunes, that it would be able to build some sort of multi-unit residential development on its property. The City interfered with those expectations, and Del Monte has borne the economic impact—to the tune of \$1,450,000—of its regulation. See *Florida Rock*, 18 F.3d at 1564 (*Lucas* "teaches that the economic impact factor alone may be determinative"). On this basis, too, affirmance is required.

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<sup>3</sup> See also *Argier v. Nevada Power Co.*, 952 P.2d 1390, 1391 (Nev. 1998) (rejecting the "claim[] that the conveyance of the property to the county terminated its duty to pay the [former owner] just compensation" for a taking); *Brooks Investment Co. v. City of Bloomington*, 232 N.W.2d 911, 918 (Minn. 1975) ("Where the governmental body does take possession of the property or damages it so as to deprive the owner of possession prior to the sale, the original owner is entitled to [compensation]" because, "[i]f the rule were otherwise, the original owner of [the] property would suffer a loss and the purchaser of that property would receive a windfall"); *City of Los Angeles v. Ricards*, 515 P.2d 585, 587 (Cal. 1973) (noting that "the right to recover [any resulting depreciation of taken property] remains in the person who owned the property at the time of the taking or damaging, regardless of whether the property is subsequently transferred to another person").

### III. THE CITY BEARS THE BURDEN OF JUSTIFYING THE APPLICATION OF ITS LAND-USE ORDINANCES TO DEL MONTE'S PROPERTY

Citing *City of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), a number of the City's *amici* contend that this Court should defer to the decision of the City on the ground that it is simply applying "generally applicable" land-use regulations, the burdens and benefits of which are shared by the community at large. See, e.g., Brief of the City & County of San Francisco et al. 16, 21.

To be sure, the rationale of *Euclid* is that where a zoning ordinance applies generally and imposes like burdens on "a majority of citizens," there is little justification for judicial intervention, because the generality of the regulation ensures an average reciprocity of advantage, and because property owners have "recourse \* \* \* to the ballot." 272 U.S. at 388, 393 (quotation omitted). As the *Dolan* Court explained in distinguishing *Euclid*, however, there is a crucial difference between "essentially legislative determinations classifying entire areas of the city," and "an adjudicative decision to condition [a property owner's] application for a building permit on an individual parcel." 512 U.S. at 385. In the latter circumstance, the Court held, "the burden [of justifying its application of the ordinance] properly rests with the city." *Id.* at 391 n.8; see *ibid.* (citing *Euclid* for the proposition that "in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation").<sup>4</sup>

<sup>4</sup> See also *Amicus Br. for United States* 29, in *Dolan v. City of Tigard*, No. 93-518 (conceding that "the Takings Clause limits the government's freedom to single out particular individuals to absorb the costs of public improvements" and that "the breadth of the affected class and the degree of disparity in treatment among

In constitutional law generally, courts appropriately pay attention to how diffusely the impact of government action is felt within the community. Where the impact of a law is concentrated on a discrete group of individuals, popularly elected representatives lack adequate incentive to determine whether the law strikes a fair balance between the interests of the community at large and those of the persons burdened by its application. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Thus, the Free Exercise Clause proscribes "'prohibition[s] that society is prepared to impose upon [religious minorities] but not upon itself'" (*Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 545 (1993)), but does not affect "neutral law[s] of general applicability" resulting from the normal "political process" in our "democratic government." *Employment Division v. Smith*, 494 U.S. 872, 879, 890 (1990). Likewise, the Court has readily sustained free speech challenges to taxes that "singl[e] out the press," reasoning that "the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened" in such circumstances, while rejecting free speech challenges to taxes of general applicability, reasoning that there is little cause to "fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (invalidating a tax targeted at the press); see also *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (sustaining a generally applicable sales tax as applied to the press). It is naive to think that simply because the government is regulating property rights—and not rights of expression, free exercise, privacy, or

landowners are crucial" factors in this determination).



others deemed fundamental in our society—its individualized, discretionary determinations carry less potential for abuse of power and judicial protection is less necessary.

The decision complained of bears all the hallmarks of an adjudicative (as opposed to legislative) determination. For any proposed development, California law requires the submission and approval of a “tentative map”—a drawing that sets forth the project’s design and site conditions—prior to development. Cal. Gov’t Code §§ 66410, 66499.58. An advisory board (here, the Commission) initially reviews the map and suggests a disposition (*id.* § 66452.1), but the local body responsible for land-use decisions (here, the Council) is free to reject its recommendations—whether it ultimately approves, conditionally approves, or denies the tentative map (*id.* § 66452.2). Thus, the City of Monterey is vested with broad discretion in the application of its land-use regulations, and the decision whether to grant a variance is made on a case-by-case basis after review by two distinct bodies. That kind of determination hardly qualifies as a law “classifying entire areas of the city.” *Dolan*, 512 U.S. at 385.

Del Monte and Ponderosa submitted no fewer than four development applications to the City, and received a detailed review setting forth fifteen conditions for approval of the development. In the end it was the dispute over compliance with the fifteen conditions—which applied *solely* to Del Monte’s proposal—that precipitated this litigation.

It cannot seriously be contended in these circumstances that Del Monte’s proposed development has been subjected to “generally applicable” regulation. As clearly evidenced by the City’s treatment of similarly situated landowners, Del Monte has borne a grossly disproportionate share of the burdens of Monterey’s land-use regulations. As the Ninth Circuit observed, “other properties surrounding the Dunes have been developed into residential units similar to the

development proposed by [Del Monte] but without the environmental and access conditions imposed by the City” (920 F.2d at 1508), and Del Monte presented ample evidence from which a jury could conclude “that the City arbitrarily and unreasonably limited use and development of [its] property and set aside open space for public use, whereas owners of comparable property along the Monterey Bay were not subjected to these conditions and restrictions.” *Id.* at 1508-1509. Stated simply, Del Monte was “singled out to bear the burden of the City’s attempt to bring back the Smith’s Blue Butterfly by creating a ‘butterfly park’ on the majority of [its] land.” *Id.* at 1509. That is not generally applicable regulation.<sup>5</sup>

In sum, this is a case in which Monterey has forced a single landowner “to bear burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Because “prohibitions that society is prepared to impose upon [isolated individuals like respondents] but not upon itself” are the “precise evil” that “the requirement of general applicability is designed to prevent” (*Church of Lukumi Babalu Aye*, 508 U.S. at 545), the most exacting review is wholly appropriate, lest the “Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment, be relegated to the status of a poor relation.” *Dolan*, 512 U.S. at 392.

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<sup>5</sup> See also *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 132 (1978) (defining “reverse spot” zoning as “a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones”).

# CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted.

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In the  
**Supreme Court of the United States**  
October Term, 1997

CITY OF MONTEREY,

*Petitioner,*

v.

DEL MONTE DUNES AT MONTEREY, LTD. AND  
MONTEREY-DEL MONTE DUNES CORPORATION,

*Respondents.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

**BRIEF OF AMICI CURIAE  
THE WASHINGTON LEGAL FOUNDATION  
AND THE ALLIED EDUCATIONAL FOUNDATION  
IN SUPPORT OF RESPONDENTS**

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**INTERESTS OF AMICI CURIAE<sup>1</sup>**

The Washington Legal Foundation (WLF) is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide, including many property owners who are faced with confiscatory land-use regulations at the federal, state, and local levels. WLF has participated as amicus curiae in numerous Fifth Amendment regulatory takings cases in this and other courts. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting sound principles in diverse areas of constitutional law and policy, including regulatory takings. AEF has appeared with WLF as amici curiae in numerous cases before this Court, including *Dolan* and *Lucas*.

**STATEMENT OF THE CASE**

In the interests of judicial economy, amici adopt by reference the statement of the case as presented in the brief filed by respondents Del Monte Dunes, et al. (collectively "Del Monte"). Nevertheless, amici will briefly present those aspects of the case as are pertinent to the arguments presented in this brief.

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, no counsel for a party in this case authored this brief in whole or in part, and no persons or entities other than amicus Washington Legal Foundation, its supporters, or counsel, contributed financially to the preparation or submission of this brief. This brief is being filed with the written consent of the parties which have been filed with the Clerk.

Del Monte owned a 37-acre rectangular shaped parcel of land on the California coast within the City of Monterey ("City") that once was an industrial site. Del Monte wished to develop the property for housing in conformance with the local zoning plan which permitted up to approximately 900 multi-family units for this size property. JA 158. However, because of environmental and other concerns expressed by the City in its desire to keep the property in its natural state, Del Monte was forced over a period of years to drastically scale back its plans ultimately to 190 units. The City initially approved the 190-unit plan with conditions that Del Monte was forced to meet. Del Monte was required to dedicate the western one-third of the property, the dune area which fronted the ocean, because the City wanted to retain the property for public beach use and access. Del Monte was even required to build a parking lot for the public with access through its development. In addition to this conveyance of an interest in real property, the City also required the reservation of the eastern third of the parcel adjacent to the highway for as a public viewshed. That left only the remaining central portion of the property available for the development.

Unfortunately for Del Monte, that area contained buckwheat plants which are the habitat for the Smith's Blue Butterfly, an endangered species, which had not been seen on the property. Del Monte's offer to move the buckwheat habitat to the other areas of the property were rejected. While Del Monte was able to meet the conditions imposed, and would even *improve* the buckwheat habitat area, the City changed its mind and denied the permit. In effect, the City forced Del Monte to paint itself into a corner, and then told Del Monte it wasn't allowed to stand there.

Del Monte filed a civil rights lawsuit under 42 U.S.C. § 1983 claiming, *inter alia*, that the City had violated Del Monte's Fifth Amendment right to be free from

uncompensated takings of private property for public use. The City unsuccessfully argued that Del Monte's claim was not ripe for review because Del Monte did not seek to scale down its plans for a sixth time. The futility of further development proposals formed the basis of the Ninth Circuit's ripeness determination in *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1502 (9th Cir. 1990) (*Del Monte I*). The City did not further appeal this decision and its conclusion is the law of the case.

The case was remanded for trial and the jury found in Del Monte's favor after properly being instructed (at the insistence of the City) that a takings occurs if the denial of the permit denied Del Monte all economically viable use of its land *or* did not substantially advance legitimate state interests. *See Agins v. City of Tiburon*, 447 U.S. 255 (1980). The jury awarded Del Monte damages for a temporary taking only, because during the litigation, the State of California, which had its eye on the property all along to be used as a state park, purchased the heavily restricted property at a substantially reduced price.

On the second appeal, the Ninth Circuit, in a well-reasoned opinion, affirmed the trial court's denial of the City's motion for judgment as a matter of law and for a new trial without a jury. *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996) (*Del Monte II*).

### SUMMARY OF ARGUMENT

The court of appeals correctly concluded that Del Monte's § 1983 civil rights action was properly tried before a jury. That conclusion is supported by both the historical context of § 1983 as well as the Seventh Amendment's guarantee to trial by jury inasmuch as Del Monte's action for damages against the City was in the nature of a



common law actions of trespass or tort, actions which were historically tried before juries.

The court of appeals also correctly found that there was sufficient evidence before the jury to support both theories of takings liability as instructed. This Court should reject the City's facile argument that the subsequent sale of the property to the State at a reduced price precludes a finding of a denial of all economically viable use of the property as a matter of law.

The City and its amici are mistaken in arguing that the "rough proportionality" standard of *Dolan v. City of Tigard* does not apply in this case because in their view, this case does not involve exactions or dedications of real property. Quite the contrary; the beach dedication, habitat conservation easement, and viewshed reservations of the kind in this case are all typical interests in real property that are regularly bought and sold. Even if "rough proportionality" does not apply in this case, this Court's taking jurisprudence demonstrates that a heightened level of scrutiny or review is required nevertheless, rather than the simple rational basis standard urged by the City.

## ARGUMENT

### I. DEL MONTE WAS ENTITLED TO A JURY TRIAL UNDER 42 U.S.C. § 1983 AND THE SEVENTH AMENDMENT

#### A. The Historical Context of § 1 of the Civil Rights Act of 1871 Shows That Congress Intended for All Substantive Liability Issues In Claims for Legal Relief under § 1983 to Be Decided by a Jury.

Before inquiring into the applicability of the Seventh Amendment, this Court first will inquire whether the statute in question may fairly be construed to provide the right to a jury trial. *Feltner v. Columbia Pictures, Inc.*, 118 S. Ct. 1279, 1283 (1998). Here, Section 1 of the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983, is a Reconstruction era statute enacted to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States.

As an initial matter, the question of whether Del Monte was entitled to a jury trial would be properly before this Court if Del Monte had lost its case tried before a judge after denying Del Monte's request for a jury trial. The City, which did lose, does not have a right *not* to have a jury, and any error in that regard is harmless. In any event, amici submit that the widespread practice of using jury trials in § 1983 actions, and numerous circuit court holdings that such jury trials are indeed required, are firmly supported by the historical context of § 1983.

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), this Court meticulously examined the legislative history of § 1983 to hold that a municipal corporation, such as the City of Monterey, is liable under § 1983 in a claim for money damages for the violation of a federal civil right. As *Monell* made clear, Section 1 of the Fourteenth Amendment was drafted with the case of *Barron v. Mayor of Baltimore*, 7 Pet. 243 (1833) in mind, in which a state court had denied compensation for an alleged uncompensated taking, and there was no federal remedy. Thus, Congress expressly intended § 1983 to provide a federal remedy for the practice, such as occurred prior to the adoption of the Fourteen Amendment, of uncompensated takings by municipal corporations. *Monell*, 436 U.S. at 686-87.

Congress certainly did not adopt a federal remedy for uncompensated takings (or the deprivation of numerous other federal rights, privileges, or immunities) because state remedies were not available.<sup>2</sup> Rather, the *Barron* case graphically illustrated the *inadequacy* of relying on state remedies to enforce federal constitutional rights. Thus, Congress enacted § 1983 precisely because a *federal* civil remedy was deemed to be the only adequate means for redressing the violation of a *federal* civil or private right, even though most states had adopted by this time, at least on paper, just compensation provisions in their respective constitutions.

The scope of relief provided under § 1983 must be interpreted within this remedial context. *Cf. Wyatt v. Cole*, 504 U.S. 169, 171 (1992) (KENNEDY, J., concurring). The language of the statute is inclusive, and strongly suggests that Congress intended the term “action at law” to have its full meaning, at least such as that was commonly understood in the federal courts of law around 1871 when § 1983 was enacted.

Prior to the merger of the courts of law and equity, liability in a claim for money damages against a municipal corporation was tried before a jury. *See, e.g., Pumpelly v. Green Bay Company*, 80 U.S. 166 (1871); *Transportation Company v. Chicago*, 99 U.S. 645 (1878); and *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U.S. 317 (1883).

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<sup>2</sup> By 1871, Maryland, like most other states, had incorporated the principle of just compensation into its constitution. *See Moale v. Baltimore*, 5 Md. 314 (1854). The 1796 corporate charter of the City of Baltimore conferred on the City the right to sue and to be sued. This probably explains why the Maryland Court of Appeals did not object to the *Barron* case being tried at law. 7 Pet. at 244.

These were “actions on the case” which, like other law actions, were tried before juries. *See Feltner v. Columbia Pictures, Inc.*, *supra*, 118 S. Ct. at 1285, 1286. Accordingly, Del Monte’s claim for money damages against the City is an action at law triable before a jury under § 1983.

**B. The Seventh Amendment Requires That a Jury Determine Liability in a Claim for Legal Relief under § 1983 for the Violation of a Federal Civil Right.**

Even in the absence of any express legislative intent providing for a jury trial, or indeed, even where a statute purports to preclude a right to a jury trial, the Seventh Amendment guarantee of the right to a jury trial in a federal cause of action may nevertheless apply in an appropriate case. *Feltner v. Columbia Pictures, Inc.*, *supra*; *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33 (1989); *Tull v. United States*, 481 U.S. 412 (1987); *Curtis v. Loether*, 415 U.S. 189, 193 (1974).

In determining whether the Seventh Amendment requires a jury trial in a statutory action, this Court will first “compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of equity and law.” *Granfinanciera, S. A. v. Nordberg*, 492 U.S. at 41, quoting *Tull v. United States*, 481 U.S. at 417-18. Then this Court will “examine the remedy sought and determine whether it is legal or equitable in nature.” *Ibid.*

The City argues that nothing equivalent to the modern civil rights complaint existed at common law. Pet. Br. at 22. This alleged “fact” leads the City to look for what it believes is the appropriate historical parallel to the modern practice. The City quickly concludes that an eminent



domain proceeding, for which it claims a jury was not required at common law, presents such a parallel. *Ibid.* at 23. The City is mistaken.

In the first place, the notion that juries were not employed in condemnation cases has been refuted.<sup>3</sup> Secondly, the City's conclusion does not follow from the premise that a takings action may be compared to an eminent domain action. Amici agree that the matter of who initiates a "takings" claim is not determinative of the Seventh Amendment right; but the petitioner is mistaken if it assumes that if the government is the initiator, no jury trial is required.<sup>4</sup> Further, the fact that "takings" claims and eminent domain proceedings may be alike in one respect does not mean that they cannot be distinguished on other grounds. Indeed, as amici will presently show, the case at bar is distinguishable from an eminent domain

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<sup>3</sup> Historical practice shows that trial by jury was usually available on appeal, even if not in the first instance. Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Northwestern University Law Rev. 144, 181 (1996) (hereinafter "Grant"). While amici believe that Grant is correct in his evaluation of English and colonial condemnation practice, amici nevertheless believe that the question is not determinative of the case at bar since "takings" claims owe their historical origins to common law conceptions of municipal liability in tort or trespass where juries were indisputably used to determine liability and damages.

<sup>4</sup> For example, when the government tries to "take" property in the form of assessing civil penalties for alleged violations of law, that proceeding is initiated by the government, and yet a jury trial still is required to determine whether the party should be held liable in the first instance. *Cf. Tull v. United States, supra.*

proceeding in terms of important common law principles.

Since *Bushell's Case*, Vaughan 135 (1670), the purpose of a jury at English common law has been to determine, not to advise. As this Court explained in *Feltner*, the phrase, "'Suits at common law' . . . refer[s] 'not merely [to] suits, which the common law recognized among its old and settled proceedings, but [to] suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.'" *Feltner v. Columbia Pictures Television, Inc., supra*, at 1284 (quoting *Parsons v. Bedford*, 3 Pet. 433, 447 (1830) (second emphasis added).

In a similar vein, in *Bonaparte v. Camden & A. R. Co.*, 3 F. Cas. 821 (1838), the court traces the English common law jury back to the *Magna Carta's* prohibition on the arbitrary seizure of property. Applying this principle to eminent domain, Justice Henry Baldwin, riding circuit, further explained:

We are therefore of opinion that the trial by jury is preserved inviolate in the sense of the constitution, when in all criminal cases, and in civil cases *when a right is in controversy in a court of law*, it is secured to each party. In cases of this description [i.e. eminent domain cases], the right to take, and the right to compensation, are admitted; the only question is the amount, which may be submitted to any impartial tribunal the legislature may designate.

*Id.* at 829 (1838) (emphasis added). In other words, the English common law would allow the *estimate of the damages* in eminent domain to be decided by any impartial tribunal, but would require the issue of *liability* in criminal or civil proceedings to be decided by a jury. This Court

has reached a similar conclusion when considering the right to a jury trial within the context of civil penalties. *Tull v. United States*, 481 U.S. 412 (1987). Compare *Bauman v. Ross*, 167 U.S. 548, 593 (1897) ("By the Constitution of the United States, the estimate of the just compensation for property taken for public use, under the right of eminent domain, is not required to be made by a jury") (emphasis added). Thus, if the City were to concede liability, amici would then agree that the case at bar would indeed be "analogous" to an eminent domain proceeding.<sup>5</sup>

In its haste to compare "takings" claims and condemnation proceedings, the City overlooks numerous and obvious alternative comparisons among common law actions. From an historical perspective, 19<sup>th</sup>-century "takings" claims against municipal corporations not only were considered analogous to common law trespass or tort claims, they were common law trespass or tort claims. See, e.g. *Barron v. Mayor of Baltimore*, 7 Pet. 243 (1833); *Pumpelly v. Green Bay Company*, 80 U.S. 166 (1871) (action in trespass on the case); *Transportation Company v. Chicago*, 99 U.S. 645 (1878) (action in trespass on the case); *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108

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<sup>5</sup> This is a federal civil rights case involving an infringement of Del Monte's private right to be free from an uncompensated taking; it is not an "inverse condemnation" case filed under state law. The term "inverse condemnation" appeared for the first time in a federal circuit court decision in *Barnes v. United States*, 241 F.2d 252, 255, n. 10 (9th Cir. 1956), and in this Court in *United States v. Bodcaw Company*, 440 U.S. 202, 204 (1979). In each instance, the term was used within the context of an implied contract theory of liability under the Tucker Act (42 U.S.C. §§ 4601-4655). The case at bar is premised on the absence of a comparable state statutory provision applicable to Del Monte at the time of the taking.

U.S. 317 (1883) (nuisance). See also *Richards v. Washington Terminal Co.*, 223 U.S. 546, 556-58 (1914) (interpreting *Fifth Baptist Church*, *supra*, as a takings case). An "action on the case" or "trespass on the case" were common law actions that did not involve a physical occupation of property by another as would be the case for simple trespass. Yet such common law actions, which formed the basis of many of these cases, existed and, as previously noted, were triable before a jury at English common law before the merger of the courts of equity and law in 1872. See *Feltner v. Columbia Pictures Television, Inc.*, *supra*, at 1285, 1286.

This practice did not change after the Revolution. Nor did it change merely because the target of the claim was a corporation established under government charter. The Fifth Amendment's Takings Clause did not alter the pre-existing forms of relief. It limited the ability of government to claim immunity from those pre-existing forms. Thus, while it may be said, as this Court rightly stated in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), that "The form of the remedy did not qualify the right," 482 U.S. at 315 (quoting *San Diego Gas & Electric Co.*, 450 U.S. at 655 (BRENNAN, J., dissenting)), it equally may be said, that the nature of the right did not qualify the form of the remedy. Otherwise, the Fifth Amendment's Takings Clause would become a limitation on the rights of the citizen, rather than on the power of government.

Municipal corporations were not entirely immune from suit under the English common law. Municipal corporations could, and commonly were, sued at law in actions sounding in contract, trespass on the case, nuisance, or other torts. *Maund v. Monmouthshire Canal Co.*, 4 M.



& G. 452 (1842); *Paine v. Partridge*, 1 Shower, 231 (1794); 1 Coke Inst. 68.<sup>6</sup>

Inspired by the adoption of the Just Compensation Clause at the federal level, citizens began bringing common law actions in state courts to vindicate what they perceived to be their right to compensation against municipal corporations. Such prototypical "takings" cases viewed the offending municipal corporation variously as being liable for violation of an implicit contract (*see e.g. The People v. Platt*, 17 Johns. 195, 217 (N.Y. 1819)), or as neglecting an affirmative obligation (*see e.g. Gardner v. Trustees of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816)), or as committing a common tort (*see e.g. Lindsay v. Commissioners*, 2 S.C.L. (2 Bay) 38, 62 (1796)). Sometimes, an action was brought in equity, sometimes an action was brought at law, depending on the nature of the requested relief. In each case, where the right to compensation was recognized, pre-existing theories of municipal liability were applied to vindicate a uniquely American conception of the right to compensation.

One of the principle grievances of American colonists against England prior to the Revolution was the gradual expansion of jurisdiction of the vice-admiralty courts. *See Grant, supra*, at 149-159. While an action could not be brought against the Crown, common law recognized the

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<sup>6</sup> *See* Dwight Arven Jones, *A Treatise on the Negligence of Municipal Corporations*, § 15 at 21 (1892) ("There seems to be no time when corporations were wholly free from responsibility for torts by the common law... [F]or numerous instances are mentioned in the ancient books where corporations were made liable in actions on the case for trespass and other torts."). Municipal tort liability extended also to the neglect of a corporate duty which inflicted special damage. *Ibid.*

right of a citizen to bring an action at law against the sheriff, customs agent, or other public official who had conducted a search or seizure. The action required the public official to justify the reasonableness of the search or seizure before a jury of 12 men who had not been appointed by the Crown. Beginning with the Stamp Act of 1765, the British government began to transfer jurisdiction over a variety of searches and seizures to the vice-admiralty courts which sat without a jury. The vice-admiralty courts would certify the existence of probable cause, thereby precluding a subsequent common law action under the doctrine of *res judicata*. *Ibid.*, at 152-53.

Government may take property by an unreasonable local zoning regulation or an unreasonable application of an otherwise valid zoning regulations, just as easily as it may take property by an unreasonable seizure or assessment of a civil penalty. In each instance, the right to bring a subsequent action at law to contest the reasonableness of the seizure, and to have liability in that action determined by a jury of one's peers (who were not appointed by the Crown), is an important and historic restraint which the common law, and the Constitution, place on the power of government.<sup>7</sup> While government at all levels may at times find this limitation on the exercise of its powers to be inconvenient, it is nevertheless a restraint which our

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<sup>7</sup> *See e.g. Granfinanciera, S. A. v. Nordberg, supra*, at 61 ("Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.").

nation's history, and the legislative history of the Civil Rights Act of 1871, have proved necessary.<sup>8</sup>

**II. THIS COURT SHOULD AFFIRM THE JUDGMENT OF THE COURT OF APPEALS BECAUSE THE EVIDENCE SUPPORTED A FINDING THAT THE PERMIT DENIAL BY THE CITY DENIED DEL MONTE OF ECONOMICALLY VIABLE USE OF ITS LAND OR DID NOT SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS.**

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<sup>8</sup> Amici recognize that a claim against the United States for just compensation under the Takings Clause must be brought to a special tribunal that sits without a jury "in the first instance." *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2144 (1998). See also Brief of the U.S. at 2, n.1, citing *Lehman v. Nakshian*, 453 U.S. 154 (1981); see also *ibid.* at 27, n.15. But this does not preclude a subsequent action at law (before a jury) against government officials attempting to enforce a confiscatory regulation or policy. See, e.g., *United States v. Lee*, 106 U.S. 196 (1882); *Hafer v. Melo*, 501 U.S. 21 (1991); see also *Surgett v. Lapice*, 49 U.S. 48 (1850) (an action of ejectment in a court of common law is strictly an action at law and in no respects analogous to proceeding in equity to remove cloud from title); *Higg-A-Rella, Inc. v. County of Essex*, 647 A.2d 862, 864 (N.J. Super) (1994); *Schwartz v. U.S. Dept. of Justice*, 435 F. Supp. 1203 (D.D.C. 1977), *aff'd*, 595 F.2d 888 (D.C. Cir.) (common law remedies may co-exist with and be broader in scope than statutory remedies on the same subject; a party may therefore invoke either one or both unless the statute expressly repeals such common law remedies). Nor would such a common law action against government officials infringe upon the sovereignty of the United States, or any other governmental entity for that matter.

**A. The Appropriate Standard of Review**

The City concedes (for obvious reasons) that the *Dolan* "rough proportionality" standard was not included in the instructions to the jury by the trial court. Nevertheless, the City believes that the Ninth Circuit's discussion of *Dolan* provides grounds for an unqualified reversal without orders for a new trial. Pet. Br. at 50.

At the outset, it is important to determine the appropriate standard of review. The Ninth Circuit discussed the *Dolan* decision in the course of the court's affirmance of the trial court's denial of the City's motion for judgment as a matter of law (formerly judgment n.o.v.). The Ninth Circuit recognized that a trial court's denial of a motion for judgment as a matter of law under Rule 50(b) is subject to *de novo* review on appeal. *Del Monte II* at 1426. The function of an appellate court reviewing the denial of a motion for judgment as a matter of law is essentially the same as the trial court. *Schwimmer v. Sony Corporation of America*, 677 F.2d 946, 951-52 (9th Cir. 1982). See also *Strain v. Payette School District*, 134 F.3d 379 (9th Cir. 1998); 5A *Moore's Federal Practice*, § 50.07(2) (2d ed. 1981). Rule 50(b) and the controlling standard of appellate review of a trial court's denial of a motion under Rule 50(b) give effect to important Seventh Amendment principles prohibiting the reexamination of a jury's factual findings except as provided by common law.

Even if, for the sake of argument, the Ninth Circuit came to the correct conclusion for "all the wrong reasons", that would not justify disturbing the jury's verdict. A party who prevailed in the court of appeals can have the judgment affirmed on any valid grounds, not just the ones articulated by the court. *J.E. Riley Inv. Co. v. Commissioner of Internal Rev.*, 311 U.S. 55, 59 (1940).



*Cf.* Fed. Rule Civ. Proc. 61 (all errors and defects to be disregarded if "substantial rights of parties" are not affected).<sup>9</sup>

In the case at bar, the jury was instructed to find in favor of Del Monte if "the preponderance of the evidence establishes that there was no reasonable relationship between the city's denial of the claims proposal and legitimate public purpose," *or* if the permit denial deprived Del Monte of the "economically beneficial use" of its land. *Del Monte II*, at 1428. As the City does not object to these jury instructions (after all, the City insisted on them), the

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<sup>9</sup> Amici recognize that in limited circumstances, this Court has subjected the determination of a trial court or state court to *de novo* appellate review because the nature of the underlying issue calls for "the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." *United States v. Bajakajian*, 118 S. Ct. 2028, 2038, n.10 (1998) (determining the excessiveness of criminal fine imposed by trial court), citing *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (imposition of judicial sanction by trial court). The City's reliance on *Ornelas*, Pet. Br. at 31, is misplaced in the context of the issues in this case. *Ornelas* and *Bajakajian* say nothing about whether an issue should be submitted to a jury in the first place. Rather, they deal only with the standard of appellate review of a trial judge's finding with respect to issues *not* traditionally decided by juries where the application of a constitutional standard is concerned. In the case at bar, however, the Seventh Amendment's Reexamination Clause provides the rule for appellate review of jury verdicts.

Nor does it follow that the jury's verdict may be nullified by supposed inconsistent findings by a trial judge when the verdict is supported by the evidence. See *Benner v. Tribbitt*, 190 Md. 6, 15 (1947) ("If any of the issues submitted to a jury were material or pertinent, the verdict (if supported by evidence) cannot be nullified by contrary findings by the court.").

question is simply whether the jury's verdict is supported by the evidence.<sup>10</sup>

**B. The Evidence Showed Del Monte Was Denied All Economically Viable Use of its Property; The Purchase of Property by a Government Agency for Public Uses Does Not Establish a Defense to that Claim.**

There can be no doubt that the jury was presented with sufficient evidence demonstrating that the denial of the permit denied Del Monte the economically viable use of its

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<sup>10</sup> The jury rendered a general verdict which did not differentiate between the two alternate theories of takings liability. An error in the instructions or submission of evidence on one theory of liability sometimes requires a new trial. But the court of appeals and this Court has the discretion to attribute the verdict to the alternate theory. *Traver v. Meshiry*, 627 F.2d 934, 938 (9th Cir. 1980) (KENNEDY, J.) ("Where more than one theory of recovery has been submitted to the jury in a civil case, and where on appeal it is claimed that as to one of the theories there was a lack of evidential support or an error of law in submitting the theory to the jury, the reviewing court has discretion to construe a general verdict as attributable to another theory if it was supported by substantial evidence and was submitted to the jury free from error."). The court below, however, believed it had to determine whether the evidence supported *both* theories of takings liability. *Del Monte II* at 1428, citing *Syufy Enter. v. American Multicinema*, 793 F.2d 990, 1001 (9th Cir. 1986). While amici believe this case lends itself more to the *Traver* either/or analysis, the evidence supports both theories of takings liability. In any event, the question of appellate review of a jury verdict is to be resolved by common law as provided by the Seventh Amendment's Reexamination Clause.

property. Del Monte showed that the City exacted the western one-third of the property for public beach use and access and the eastern third for a public viewshed. Finally, Del Monte showed that the City's categorical permit denial prevented Del Monte from building on the remaining portion of the parcel in order to protect butterfly habitat. Del Monte's experts concluded that the property was left essentially unmarketable. (JA 254-258.) Del Monte met its initial burden of production. In response, the City evidently failed to meet its burden of production to either rebut the factual basis of Del Monte's denial of economic viability claim or to mount an affirmative defense. Rather, the City presented as a defense only the purchase of the subject property by a government agency in 1991 for half of its value. *See* Pet. Br. at 10.

The court of appeals correctly rejected the City's argument that, as a matter of law, the purchase of the property precluded a finding of a taking by the jury on the economically viable use theory. *Del Monte II* at 1432. In doing so, the court articulated several compelling reasons why such a buy-out does not obviate a finding of a taking. *Id.* at 1432-33. Amici note that the reduction in value of Del Monte's property caused by development restrictions and the subsequent purchase of this white elephant by the government "on the cheap" is simply a new variation of an old theme.

Early Euclidean zoning was designed primarily to separate incompatible uses and to promote orderly development. *See generally*, Zeigler, 1 *Ratkopf's The Law of Zoning and Planning* §§ 1.01 *et seq.* at 1-1, 1-22 (1991); and Anderson, 1 *American Law of Zoning* §§ 3.07 *et seq.* at 96-104 (1986). More recently, the use of special zoning districts and *ad hoc* land use techniques have become commonplace; yet their use raises concerns not implicated by more conventional forms of zoning. This is particularly

so where contributions of land or money are exacted on a more or less *ad hoc* basis, *see Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), or where, as here, the government authorities practically reserve the land for a use that closely resembles a common object of eminent domain. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The history of zoning law provides numerous examples of confiscatory restrictions imposed to preserve the social amenity of undeveloped land for the benefit of existing residents. The cases of "buffer zoning" come to mind. *See, e.g., Spaid v. Board of Co. Comm'rs*, 259 Md. 369, 269 A.2d 797 (1970); and *Dowsey v. Village of Kensington*, 177 N.E. 427 (N.Y. 1931). *See also Troy Campus v. City of Troy*, 349 N.W.2d 177, 180-81 (Mich.App. 1984) (traffic problems caused by previous zoning decisions cannot be solved by downzoning last vacant lot in a commercial district to residential use); and *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1073-74 (STEVENS, J., dissenting) (citing cases). The more developed a surrounding area becomes, the more valuable its remaining undeveloped land becomes for the social amenity which the undeveloped land provides. Sometimes neighboring residents mistakenly believe that they have a legal right to the *status quo*. Where land is reserved for use in its natural state, as it is being required here, there is the *heightened* risk (as opposed to a typical risk associated with other land use regulations), that it is being pressed into some form of public service. *See Lucas v. South Carolina Coastal Council*, 505 U.S. at 1018. However, the



reservation of land for other public or quasi-public uses presents many of the same concerns.<sup>11</sup>

For example, street reservation statutes go back almost as far as this nation's history. See *Bauman v. Ross*, 167 U.S. 548 (1897). In the 19th century, municipalities commonly established general plans to guide future development of the city in the placement of streets and roads and other public facilities. Land was commonly reserved for future public improvements at the time of subdivision plat approval. The land was then opened using the power of eminent domain. It didn't take long for someone to figure out that it might be cheaper to acquire the land for a needed public street or road if the land remained in an undeveloped condition.

Thus, by an act of 1817, the City of Baltimore provided that when a street should be opened, only nominal damages would be paid to the owner of the land lying within the roadbed since the land was to be valued as unimproved and un-improvable. The Maryland Court of Appeals termed the act of 1817 "which denies to the proprietor the use of his land, as nothing short of an act of confiscation." *Moale v. Baltimore*, 5 Md. 314, 321-22 (1854). See also *Md.-Nat'l Cap. P. & P. Comm'n v.*

<sup>11</sup> D. Hagman distinguishes the "reservation" of land from its formal "dedication" because, "Dedication ordinarily involves the conveyance of an interest in land by the fee owner to the public....Reservation, on the other hand, involves no conveyance but restricts the right of the subdivider and others to use the land for anything but the restricted purpose." *Id.*, *Urban Planning and Land Development Control Law* § 140 at 259 (1975). From the property owner's perspective, reservations may be worse than dedications because the property owner continues to pay taxes on reserved land, while enjoying none of the property's private benefits.

*Chadwick*, 286 Md. 1 (1979); *Lomarch Corp. v. Mayor of Englewood*, 51 N.J. 108, 237 A.2d 881 (1968); *Hoyert v. Bd. of County Commissioners*, 262 Md. 667, 278 A.2d 588 (1971) (attempt to depress value of property in anticipation of subsequent condemnation declared invalid); and *Carl M. Freeman, Inc. v. St. Rds. Commission*, 252 Md. 319, 250 A.2d 250 (1969) (ordinance declared invalid because its sole purpose was to freeze land values). The difference between the reservation statutes denounced in *Moale*, *Chadwick* and *Lomarch*, and the "buffer" zones denounced in *Spaid* and *Dowsey*, was that the reservation statutes at least acknowledged the obligation to pay *something* for land, albeit at an unspecified future date.

The City of Monterey's intense interest since at least 1984 in the public acquisition of Del Monte's land is well established in the record. R.T. 215-17 (Letter from Mayor of Monterey to California Coastal Commission dated June 13, 1984 endorsing plans by State to purchase the property as being "fair" to the owner). The State of California in fact found funding for the acquisition subsequent to the 1986 permit denial, and the property was purchased in 1991 for \$4.5 million, about half the value of the property had the City not denied even the drastically scaled-down project. R.T. 709. We may assume that there was a legitimate public need for dune access, viewshed, and butterfly habitat in the vicinity of Del Monte's property at the time the permit was denied, and that the State of California's subsequent acquisition of the property served a legitimate public purpose. The question is whether the means by which the City set about achieving its goal bear the necessary connection to this objective.

Considered within the context of the exactions, the City's categorical denial of Del Monte's permit application effectively restricted Del Monte's right to use its property for anything but the restricted purposes of dune access,

viewshed and butterfly park, pending subsequent public acquisition at an unspecified future date. The State of California did in fact subsequently acquire the property, but in so doing, compensated Del Monte only for the value of the land subject to restriction. (JA 259-260, 264). As previously stated, this is just a new variation on an old theme. At least in Moale's case, Baltimore bothered to enact legislation purporting to justify the confiscation.

Reservation statutes have long been associated with uncompensated takings by municipal corporations. This perhaps explains why most courts decline to accept certain *public* or *quasi-public* uses as establishing an economically beneficial use of land. Such uses include parking facilities, parks, schools, public housing and recreational facilities. *Troy Campus v. City of Troy*, 349 N.W.2d, at 180-81. See Zeigler, 1 *Ratkopf's The Law of Zoning & Planning* § 6.07[6] at 6-48, 6-51 (1991) (discussing cases). See also *Bowles v. United States*, 31 Fed. Cl. 37, 48-49 (1994); *Formanek v. United States*, 26 Cl. Ct. 332, 340-41 (1992); *Lucas*, 505 U.S. at 1019 (listing federal and state statutes permitting acquisition of private lands for public use). This Court should affirm the court of appeals and make it clear that the willingness of a government or non-profit agency to purchase land for a public use is insufficient to defeat a "takings" claim as a matter of law.<sup>12</sup>

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<sup>12</sup> In any event, as the lower court correctly stated, the test is whether the restrictions have denied the owner all economically viable *use* of the property; not whether the property has some residual value that can be realized only by disposing of it. *Del Monte II* at 1432-33.

**C. An Adjudicative Decision to Restrict the Use of Certain Property Should Be Subjected to Heightened Scrutiny under the Just Compensation Clause.**

In *Dolan v. City of Tigard*, this Court applied the maxim first enunciated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), that a land use regulation is confiscatory "if not reasonably necessary to the effectuation of a substantial government purpose." 512 U.S. at 388, quoting *Penn Central*, 438 U.S. at 127. In the context of a developmental exaction, this Court determined that a regulation requiring the conveyance of property was not "reasonably necessary" to effect a substantial public purpose unless the exaction was "roughly proportional" to needs created by the landowner's proposed new use of his property. *Dolan, supra*, at 391. This Court has not yet defined the degree of necessity that is required to support land use regulations in many other contexts. But it is clear that the "reasonably necessary" standard continues to serve as the "floor" or level from which to evaluate land use regulations. So the question in this case is (1) whether the *Dolan* "rough proportionality" standard applies to the case at bar, and (2) if it does not, does the "reasonably necessary" test of *Penn Central* require a greater degree of review or scrutiny than the rational basis test under the Equal Protection Clause as urged by the City. Amici submit the answer to both questions is "yes."

The City and its supporting *amici* urge that the "rough proportionality" standard enunciated in *Dolan* should never apply to a takings claim that is predicated on a permit denial. The problem with this argument is that the Dolans advanced their claim in the form of an appeal from the denial of a variance permit. *Dolan*, 512 U.S. at 381.



Similarly, while the California Coastal Commission issued the Nollans' building permit with conditions to which the Nollans objected, the Commission just as easily might have rejected the permit application outright because the Nollans refused to accept the permit conditions. Clearly, a permit denial provides just as good an occasion to test the constitutional propriety of an exaction as a permit issuance.

The City and its supporting *amici* also attempt to distinguish *Nollan* and *Dolan* from the case at bar because the former involved *physical invasions*, while the case at bar supposedly involves a mere restriction on Del Monte's use of its land. This objection fails because the factual premise of this argument is erroneous. The City exacted a beach/dune access easement from Del Monte comparable to the easements exacted from the Nollans and Dolans.

This Court distinguished the Dolans' case from traditional zoning regulations because *Dolan* involved an *adjudicative* decision<sup>13</sup> to condition a permit application for an individual parcel, and because it involved the actual *conveyance* of property to the city in the form of a "permanent recreational easement" that would not merely regulate the Dolans' right to exclude others from their property, it would "eviscerate" it. 512 U.S. at 394.

The case at bar also involves an adjudicative decision to condition certain land and it involves actual conveyances and dedications which would require the public to trample upon Del Monte's property, thereby eviscerating Del Monte's right to exclude. There can be no doubt that a taking of Del Monte's property by the City was required as

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<sup>13</sup> Indeed, *Dolan* made clear that the burden of proof "properly rests on the city" *because* it had made an adjudicative decision to condition the Dolans' building permit application. 512 U.S. at 391, n.8.

a condition for any development to occur on the property, much like the scenario in *Dolan*. *Dolan* considered the "rough proportionality" standard as part of its discussion of what *defenses* would be available to government entities facing such *partial* takings claims. And while much of Del Monte's property is being required to be dedicated, this Court has never held that physical invasions or formal conveyances or dedications are the *only* means by which takings of property interests may occur. See, e.g., *San Diego Gas & Electric Co.*, 450 U.S. 621 (1981), in which five members of this Court recognized that a mere zoning regulation affecting a portion of a parcel could effect a taking; and *Howard County v. JJM, Inc.*, 301 Md. 256, 280-81, 482 A.2d 908 (1984).<sup>14</sup> In *del Monte*, the dedication and reservations involved in this ~~case~~ constitute habitat, conservation, and viewshed easements; these are property interests which are bought and sold all the time. *Amici* thus find it odd that the City and its supporting amici are actually advocating that this Court strip them of a defense (*Dolan's* "rough proportionality" standard) to such takings.

Del Monte also argued in the trial court that the City's exactions were unreasonable, and thus not reasonably necessary to advance the City's stated objectives. The City's denial of Del Monte's permit application effectively reserves one-third of the parcel as butterfly habitat, which itself may be deemed an exaction. *Howard County v. JJM Inc.*, *supra*. In effect, the City progressively exacted the entire parcel and now has the audacity to claim that *Dolan*

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<sup>14</sup> Even if the California Coastal Commission had passed a regulation prohibiting all coastal landowners who receive a building permit from interfering with beach access by the public on the owner's property, the restriction would nevertheless be confiscatory.

does not apply at all because there is nothing left of the parcel for the City to rely on in its defense to justify the exactions!<sup>15</sup> Thus, while the *Dolan* "rough proportionality" test may not necessarily apply to every kind of land use regulation, the court of appeals below nevertheless had ample reason to apply the standard here.

At the same time, the real problem with the City's argument is its casual assumption that the standard of review under the Takings Clause necessarily defaults to the minimal level of scrutiny applied under the Equal Protection Clause of the Fourteenth Amendment whenever the *Dolan* "rough proportionality" standard is found not to apply<sup>16</sup>. This Court's decisions allow for no such result. Justice Brennan argued the position advanced by the City and its supporting *amici* very forcefully in *Nollan*, citing virtually the same due process and equal protection cases.

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<sup>15</sup> The City cannot escape the *Dolan*'s applicability by simply denying *all* development. Thus, a proportionality test would have applied to the Dolans' property even if, instead of seeking a building permit to expand its already existing hardware store, the Dolans wanted to build a new hardware store on vacant land, and were told that a building permit would be conditioned on bike-path and floodplain exactions.

<sup>16</sup> The City assumes that the standard of review in the case at bar is the same as the standard of review under the Due Process Clause or the Administrative Procedures Act because the City mistakenly assumes that the issue before this Court is the same as the issues presented before the City Council which denied Del Monte's permit application. In fact, the issue in the case at bar is not whether the City's actions were arbitrary and irrational, but who should pay for the otherwise reasonable purpose of preserving Del Monte's land for beach access, viewshed, and butterfly habitat.

See *Nollan*, 483 U.S. at 843 (BRENNAN, J., dissenting). This Court nevertheless held that the challenged land use regulations were confiscatory despite the fact that they were "rationally based."

This Court has never held that only one standard of review applies to all takings claims regardless of the nature of the regulation or the private interests affected<sup>17</sup>. In the case at bar, the City has made an adjudicative decision to restrict individual property in a manner that is in derogation of important common law rights. The level of interference is severe, even assuming that it is not complete. Also, the City's discretion is extremely broad to approve, or not to approve, anywhere from 0 to 900 homes on the subject property.

In short, there is good reason why the City's actions should be subject to heightened scrutiny even if *Dolan*'s "rough proportionality" is found not to apply. At a minimum the City should have the burden of explaining why it had to deny Del Monte's permit application categorically, without any further guidance as to how to make the project acceptable. While the City is not required to adopt the least restrictive means, its refusal to accept obvious and suitable alternatives (after numerous attempts by Del Monte to meet the City's concerns) to a total ban on development create the heightened risk that Del Monte's

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<sup>17</sup> There is thus no particular reason to believe that a regulation restricting the right to build on one's own land, *Nollan, supra*; *Dolan, supra*; *Lucas, supra*, or the right to dwell with whomever one chooses, *Moore v. City of East Cleveland*, 431 U.S. 494, 513-521 (1977) (STEVENS, J., concurring in judgment) needs to be subjected to the same level of judicial review as regulations governing rent control, *Yee v. City of Escondido, supra*, or a retirement health benefits plan. *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998).



land is being pressed into some form of public service under the guise of regulating the use of land.

**D. The City's Own Testimony Shows That it Is Liable for Taking Del Monte's Property.**

Ordinarily, a jury's verdict is judged in relation to the instructions to the jury. But "a reasonable jury is presumed to know and understand the law, the facts of the case, and the realities of the market." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 243 (1993). The jury had plenty of evidence to support a finding that Del Monte's property was effectively being denied any economically viable use.

Del Monte also introduced evidence to show that the City's categorical permit denial was not "reasonably related" to any of the City's stated objectives. *Del Monte II*, at 1429-30. The City produced its own experts who testified that the City's categorical denial of Del Monte's permit application was necessary. Whatever else may be said about the City's denial of Del Monte's permit application, it is clear that it was *categorical*, without any further direction as to how the project might be made acceptable to the City. The City categorically rejected a proposal to build 190 homes.

Yet after this action was initiated, the State of California acquired the subject property. In calculating the purchase price, "the State relied upon an appraisal that assumed that the highest and best use of the property was for residential development with a density of up to 150 units." Pet. Br. at 10. At trial, the City shamelessly introduced this appraisal as proof of the continuing economic viability of Del Monte's property subject to restriction. *Ibid.* By introducing the appraisal, the City effectively concedes that 150 homes could have been built

consistent with the City's legitimate objectives. Why then did the City need to deny Del Monte's permit application *categorically*? Because 150 homes have to go someplace, a reasonable jury might have inferred that one or more of the restrictions placed on the subject property by the City were not reasonably necessary to achieve the City's stated objectives. In short, the City is impeaching their own experts by suggesting the 150 units could have been built on the property despite all the alleged environmental concerns. Given this internal conflict in the City's own statement of the facts, the jury reasonably might have inferred that the City's real purpose was other than the stated ones.

This Court has often repeated the maxim that a land use regulation may be confiscatory "if not reasonably necessary to the effectuation of a substantial government purpose." *Dolan v. City of Tigard*, 512 U.S. at 388. But this Court has never explained the reasons for this rule. Perhaps it is simply the fact that land use regulations that do not substantially advance the *stated* public objectives so often are found to be directed towards some unstated public goal such as acquiring the land without having to pay for it. See *Nollan*, 483 U.S. at 837 ("Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of

compensation.”).<sup>18</sup> In any event, the case at bar confirms the wisdom of this rule.

Ordinarily, a party to litigation is assumed to present the facts in the light most favorable to its case. Where, as here, a party is liable according to its own statement of the facts, a reviewing court need look no further. Nor should a reasonable jury have to look further.

### CONCLUSION

For the foregoing reasons, amici curiae urge this Court to affirm the judgment of the court of appeals.

Respectfully submitted.

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<sup>18</sup> The jury was instructed that the City’s “underlying motives and reasons are not to be inquired into.” *Del Monte II*, at 1429. This must refer to the *personal* motivations of the City Council members. The jury was not obligated to assume that the public purpose of the permit denial was limited to the purposes stated by the City.